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Court of Appeals, 2nd Cir. The assistant district attorney's erroneous definition of voluntary as "that means anything I say, if I ask you a question, you will answer the question," given to the accused during police station interrogation was not harmless where district attorney elicited statement that defendant had shot the victim to get his money—a key element in establishing motive which supported a conviction of murder rather than manslaughter. United States *ex rel.* Vanderhorst v. La Vallee, 417 F.2d 411, 6 CLB 212.

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§1.20. Absence of counsel

Court of Appeals, 2nd Cir. Incriminating statement elicited during interrogation of petitioner at state police barracks after his attorney had spoken to police and requested that interrogation cease until attorney arrived, were obtained in violation of petitioner's constitutional right to assistance of counsel, and admission of statements into evidence at trial was reversible error. United States *ex rel.* Magoon v. Reincke, 416 F.2d 69, 6 CLB 84.

Court of Appeals, 7th Cir. Where government did not prompt fellow prisoner to obtain information from defendant or to furnish defendant's voluntary statements to government officers, admission of fellow prisoner's testimony in evidence at defendant's perjury trial was not a violation of his Sixth Amendment right to counsel and was proper. United States v. Mitchell, 417 F.2d 1246, 6 CLB 289.

Florida Where defendant, arrested while in an intoxicated and beaten condition asked for an attorney, and police officers aided her in finding one, it was error to admit confession which she gave while counsel was on his way to the police station since all questioning should have immediately stopped at the moment she indicated her desire to have an attorney present. Written waiver of her rights held ineffective in light of her physical state. Wakeman v. State, 237 So.2d 61, 6 CLB 468.

§2.00. Prerequisite of custodial interrogation

Court of Appeals, 2nd Cir. Where the only information possessed by FBI agents when they questioned the defendant at

his apartment was the presence of his automobile near the scene of the robbery, and the agents knew that they could not lawfully arrest him and abstained from any threat that they would, a false exculpatory remark given by the defendant in response to such questioning before warnings of his constitutional rights were given was properly received in evidence. The court felt that the fact alone that the suspect had become the "focus" of the investigation was not enough in and of itself to bring *Miranda* into play. United States v. Hall, 421 F.2d 540, 6 CLB 354.

Court of Appeals, 7th Cir. Where the defendant was interrogated by an Internal Revenue agent for three hours in an 18′ x 20′ room in basement of post office with the door closed except for one brief interruption and where the defendant had not previously been advised that attendance at interrogation was voluntary or that he could leave at any time, failure to warn the defendant as to his right to remain silent and to counsel precluded admissibility of any evidence obtained as a result of such interrogation. United States v. Lackey, 413 F.2d 655, 6 CLB 47.

New Jersey *Miranda* warnings are not required to be given to persons charged with drunken driving under state motor vehicle law. State v. Macuk, 268 A.2d 1, 6 CLB 520.

New York Pre-arrest informal questioning in her own home of a woman whose lawyer had been contacted and was on the way was a constitutionally impermissible custodial interrogation; the facts and circumstances were so suspicious and blatantly incriminating that the police will be deemed to have taken defendant into custody. People v. Paulin, 306 N.Y.2d 929, 6 CLB 299.

Minnesota One being served with a search warrant may be asked if he is the owner of the premises named in the warrant without first being given *Miranda* warnings. State v. Boykin, 172 N.W.2d 754, 6 CLB 224.

§2.10. Sufficiency of warnings

Court of Appeals, 4th Cir. Statements taken in violation of an agency's directives to its employees regarding constitutional rights of citizens are inadmissible, even though the agency's announced procedures were more "generous" than the minimum standards mandated by the Constitution. United States v. Heffner, 420 F.2d 809, 6 CLB 353.

Indiana Arresting officer's statement to defendant that state would "furnish her an attorney" if she could not afford one was not sufficient to inform her that she had a right to presence of attorney during interrogation after arrest or that she had right to attorney prior to interrogation, thus rendering her extra-judicial statement made thereafter to arresting officer inadmissible. Goodloe v. State, 252 N.E.2d 788, 6 CLB 224.

Michigan Where defendant was not explicitly informed that he had a right to have counsel with him during interrogation before defendant made exculpatory statement, admission of statement in murder prosecution constituted reversible error. People v. Ansley, 171 N.W.2d 649, 6 CLB 222.

§2.30. Res gestae, volunteered and spontaneous statements

D.C. Ark. Incriminating statements made by husband who was arrested after he voluntarily appeared at police station during questioning of wife were voluntary and spontaneous even though husband had not been advised of his rights to remain silent and to counsel after his arrest. Haire v. Sarver, 306 F. Supp. 1195, 6 CLB 212.

Maryland Defendant's outburst of incriminating statements at time of his arrest held admissible in absence of *Miranda* warnings where police officer testified that because of defendant's belligerence he had been unable to give defendant the warnings and or even talk to him. Statements must be construed as product of explosive outburst and not result of

police interrogation. Blevins v. State, 261 A.2d 797, 6 CLB 367.

§2.35. Silence as an admission

Kansas The defendant's Fifth Amendment rights were violated by admitting into evidence a detective's testimony that the defendant remained silent while being confronted with the incriminating statements of an alleged accomplice. State v. Bowman, 461 P.2d 735, 6 CLB 231.

§2.50. Statement to persons other than police

Indiana Fact that newspaper reporter, who was summoned by defendant to his jail cell, spoke to the police about the requested interview prior to going to see the defendant, did not establish that reporter was an agent of police or working in their behalf; and his testimony at defendant's trial about the substance of the interview would not be excluded on the ground that the defendant was not warned prior to the interview of his right to remain silent or to have assistance of counsel. Lipps v. State, 258 N.E.2d 622, 6 CLB 416.

Maryland Private employee, sworn as a state police officer to protect his employer's property is a law enforcement officer within the contemplation of *Miranda*. Admission of statements taken from defendant after he was apprehended by employee was, therefore, reversible error, since *Miranda* safeguards were not followed. Pratt v. State, 263 A. 2d 247, 6 CLB 368.

§2.60. Applicability of Miranda to other proceedings

New York Voluntary statement of arson given police by insured was admissible in action against insurer on fire policies, although statement was inadmissible in arson prosecution. Terpstra v. Niagara Fire Insurance Co., 308 N.Y.S.2d 378, 6 CLB 366.

§2.70. Use of statement obtained in violation of Miranda

North Carolina Defendant's statement, although taken in violation of *Miranda*, may be admitted as part of the state's attempt to impeach defendant's credibility by a prior inconsistent statement. State v. Catrett, 169 S.E.2d 248, 6 CLB 54.

New York Where statements made by defendant were inadmissible on the People's direct case, and the defendant did not "open the door" on his direct examination, it was reversible error for the prosecution on cross-examination to range beyond the defendant's direct examination in order to lay a foundation for the later use of this tainted evidence. People v. Rahming, 311 N.Y.S.2d 292, 6 CLB 466.

§3.00. Procedure for determining admissibility

United States Supreme Court Where a federal court finds a *Jackson* v. *Denno* error (here, the trial judge's failure to make a preliminary determination of voluntariness prior to submitting the issue to the jury), the appropriate remedy is to allow the state a reasonable time to make an error-free determination on the voluntariness of the confession at issue. It was, therefore, error for a U.S. Court of Appeals to pass judgment on the voluntariness of a defendant's confessions without first permitting a state court to make such an evaluation uninfluenced by the apparent finding of voluntariness at the original state court trial. Sigler v. Parker, 24 L Ed.2d 672, 6 CLB 393.

§3.10. Standing

Court of Appeals, 8th Cir. Defendant lacks standing to challenge testimony of co-participant implicating defendant in armed post office robbery where defendant claims that such testimony was unconstitutionally tainted by the illegality of co-participant's prior confessions. United States v. Bruton, 416 F.2d 310, 6 CLB 84.

§3.40. Scope of hearing

Washington Refusal of trial court to per-

mit defendant to introduce his own testimony as to his ability to understand his right to counsel in light of his limited educational and environmental background rendered his incriminating statement inadmissible. City of Seattle v. Gerry, 458 P.2d 548, 6 CLB 54.

§5.02. Psychiatric examination by prosecution

Court of Appeals, 9th Cir. Where, after indictment, and without notice to and in absence of counsel, county attorney sent psychiatrist to interview accused who had given notice of asserting insanity defense, and psychiatrist was permitted to testify at trial as to his meeting with accused, defendant was denied right to assistance of counsel at critical stage of criminal proceeding as required by 6th Amendment. Schantz v. Eyman, 418 F.2d 11, 6 CLB 290.

§5.10. Arraignment and preliminary hearing

United States Supreme Court Defendants at preliminary hearing in Alabama are entitled, under the Sixth Amendment, to the assistance of counsel. Constitutional harmless error test held applicable in determining whether denial of counsel at preliminary hearing requires reversal of conviction. Coleman v. Alabama – U.S. – (6/24/70), 6 CLB 396.

Oregon Proceeding at which a defendant waives his right to be indicted by a grand jury is not a "critical stage," and waiver made in the absence of counsel is valid. State v. Miller, 458 P.2d 1017, 6 CLB 56.

§5.25. Misdemeanors

Arizona The misdemeanor of unlawful possession of dangerous drugs, punishable by five months incarceration, $300 fine, or both, was deemed a serious misdemeanor within the rule limiting the indigent defendant's right to court-appointed counsel to felonies and serious misdemeanors. The Arizona Supreme Court decided that counsel may be provided in those other cases where the trial court in its discretion believes that the complexity of the case is such that the ends of justice require legal representation. Burrage v. Superior Court, 459 P.2d 313, 6 CLB 56.

§5.40. Sentencing

Court of Appeals, 2nd Cir. A state prisoner, currently serving a 25-30 year sentence imposed upon him in 1948 as a second offender, was prejudiced by ineffective assistance of counsel at the sentence proceeding of his first conviction in 1942; proper consultation between prisoner and assigned counsel might have resulted in a shorter sentence being imposed in 1942, thereby hastening the expiration of his 1948 sentence. United States *ex rel.* Condon v. McMann, 417 F.2d 664, 6 CLB 227.

§5.50. Probation revocation hearing

Iowa Presence of counsel, notice and hearing are not required for revocation of probation where sentence was pronounced but suspended at time of trial. Cole v. Holliday, 171 N.W.2d 603, 6 CLB 103.

§5.60. Parole revocation hearings

Court of Appeals, 10th Cir. There is no denial of equal protection of the laws to indigent parolees who are unable to hire attorneys to assist in the preparation of documentary material and filing of written statements on their behalf. Such filing does not amount to legal representation. Martinez v. Patterson, 429 F.2d 844 (10th Cir.), 6 CLB 595.

§6.10. Appeals — in general

New York If defendant was unable to afford to continue to pay retained counsel, his knowledge of a right to appeal, without knowledge that he could do so as a poor person, was insufficient to establish an informed waiver of his right to appeal. People v. Delgado, 309 N.Y.S.2d 970, 6 CLB 417.

§7.00. Ineffectiveness — in general

Court of Appeals, D.C. Cir. Appellant

was not denied the effective assistance of counsel where counsel was unable to obtain expert psychiatric testimony due to a misunderstanding about the legal relationship between narcotics addiction and insanity. Heard v. United States, 419 F.2d 682, 6 CLB 289.

Court of Appeals, 2nd Cir. Where early in the trial the defendant's attorney told the trial judge, outside the presence of the jury, that he was not very happy about being counsel in the case and during trial he was twice observed to be sleeping when co-defendant's counsel was examining a witness, while on another occasion during the proceedings he allegedly was "too aggressive" in making a "totally unwarranted" attack upon the credentials of an expert witness, the question of whether or not the defendant was adequately represented by counsel could not be divorced from the factual circumstances with which he was confronted. In view of the government's overwhelming case, there was not much the best attorney could do other than to put the prosecution to its proof and press the question of reasonable doubt, and the defendant was therefore not deprived of adequate representation. United States v. Katz, 425 F.2d 928, 6 CLB 456.

California Public defender who failed to research facts and law and permitted petitioner to plead guilty to a crime of which he could not have been found guilty did not provide the petitioner with the effective assistance of counsel. *In re* Williams, 460 P.2d 984, 6 CLB 167.

§7.10. Conflict of interest in joint representation

Pennsylvania Representation of co-defendants at joint trial does not *per se* give rise to a conflict of interest; convicted defendant must show that there was an attempt to exonerate co-defendant at his expense. Commonwealth v. Williams, 257 A.2d 544, 6 CLB 103.

South Dakota Appointment of same attorney to represent two co-defendants who were tried separately created actual conflict of interest which denied defendant his constitutional right to effective assistance of counsel and required reversal of conviction, where defendant's testimony at co-defendant's trial (which had only been given to deflect guilt away from co-defendant) was read into record at defendant's own trial and fulfilled state's burden of proof as to certain elements of the crime charged which were otherwise not proved. State v. Goode, 171 N.W.2d 733, 6 CLB 226.

§7.20. Limitations placed on the right of attorney and client to confer

Michigan Denying the defendant the right to communicate by telephone or have visitors or to seek advice of counsel for a period of fifteen days after his arrest was not prejudicial where defendant was in serious condition from gunshot wounds; where he made no statements or admissions; and where he was not otherwise adversely affected during such time. People v. Sullivan, 170 N.W.2d 514, 6 CLB 56.

§7.40. "Last minute" assignments

United States Supreme Court Allegation in federal *habeas corpus* petition of last minute assignment of counsel does not, by itself, warrant granting of evidentiary hearing. Chambers v. Maroney, – U.S. –, 6 CLB 398.

Court of Appeals, 6th Cir. Where district court granted defendant's petition for *habeas corpus* on ground of ineffective assistance of counsel due to appointment of counsel on the day the case was set for trial, but made no finding of fact that the late appointment of counsel operated to prejudice defendant, court on remand should make specific finding on issue whether late appointment prejudiced defendant. Callahan v. Russell, 423 F.2d 450, 6 CLB 408.

§7.56. Failure to introduce evidence or make objections

Court of Appeals, 5th Cir. Accused was

denied the effective assistance of counsel where assigned counsel visited the accused only once for 15 minutes three days before his trial for armed robbery, did not ask accused if he wished to subpoena any witnesses, and made no objection to exhibits that were offered but were found by the trial court to have been irrelevant, prejudicial and improperly identified. Caraway v. Beto, 421 F.2d 636, 6 CLB 354.

§7.57. Making improper stipulations

Illinois Where defendant's privately retained counsel stipulated that trial court, in bench trial on charge of carrying concealed weapon, could consider defendant's testimony given during pre-trial motion to suppress, and trial court considered the testimony as a judicial confession, stipulation deprived defendant of any defense which might have been made on the issue of concealment and amounted to inadequate representation which deprived defendant of a fair trial. People v. Martin, 252 N.E.2d 722, 6 CLB 226.

§7.80. Right to defend pro se

Court of Appeals, 8th Cir. Where petitioner, 40 years old at arraignment, specifically acknowledged, *inter alia*, that court had recommended that he have an attorney; that he understood what indecent molestation of children was; that he understood he could be imprisoned up to 20 years; that he understood he was charged with a serious felony; that he did not want a trial; that he knew he was entitled to one; and that he wanted to get his sentence over with, waiver of counsel was voluntary and all federal constitutional requirements were fulfilled. United States *ex rel.* Miner v. Erickson, 428 F.2d 623(8th Cir.), 6 CLB 596.

§8.00. Co-defendant's statement

Court of Appeals, 3rd Cir. Defendant, who was jointly tried with his brother and convicted of murder in the first degree was not deprived of his right of confrontation by admission of his brother's confession, which implicated the defendant as chief culprit, where brother's confession was read on cross-examination of brother and the defendant elected not to cross-examine brother. Wade v. Yeager, 415 F.2d 570, 6 CLB 82.

Court of Appeals, 5th Cir. Hearsay testimony by an undercover agent to a statement made by a defendant which incriminated the defendant was properly admitted where the co-defendant's statement was made during the actual commission of the crime and in furtherance thereof; nor did such statement compel the granting of a motion for severance. A Fifth Circuit panel holds *Bruton* v. *United States* inapplicable by distinguishing a "post-crime confession" from an implicating statement by a co-defendant during the course of the illegal transaction. McGregor v. United States, 422 F.2d 925, 6 CLB 408.

Court of Appeals, 5th Cir. Confession of a co-defendant in a conspiracy trial is properly admissible and is not prejudicial to the right of confrontation of other co-defendants, where all references to the other defendants are deleted and all items which tend to identify them are omitted, where the confession is read to but not seen by the jury and where the trial court instructed jury that the confession was considered only against its maker. Posey v. United States, 416 F.2d 545, 6 CLB 82.

California Admission into evidence of extra-judicial statements made by one co-conspirator at joint trial of two men charged with murder under co-conspirators' exception to hearsay rule, did not violate right of confrontation of second co-conspirator. People v. Brawley, 461 P.2d 361, 6 CLB 217.

§8.05. Opportunity to cross-examine

New York Defendant was not deprived of his constitutional right to confront witnesses against him, though convicted in a joint trial in which confessions of co-defendants incriminating as to him were admitted where the defendant had the opportunity to cross-examine co-defen-

dants at a hearing held to determine the voluntary nature of the confessions, and where the defendant's own voluntary confession was properly received against him. People v. Moll, 26 N.Y.2d 1, 6 CLB 358.

§8.10. Harmless error

California The admission of a co-defendant's extra-judicial statements inculpating the defendant was error despite fact that the jury was instructed to disregard such evidence in determining defendant's guilt, and despite the fact that the co-defendant had testified at the joint trial. Such error was harmless beyond a reasonable doubt where, in addition to fact that defendant had opportunity to cross-examine the co-defendant, the defendant had made essentially similar extra-judicial statements himself with respect to both of prosecution's theories—that the killing was willful, deliberate and premeditated, and that it was committed in the course of a rape. *In re* Whithorn, 462 P.2d 361, 6 CLB 226.

New York Testimony of three police officers as to a co-defendant's confessions that implicated the defendant in the crimes charged was not harmless error and required reversal of the conviction where evidence of guilt was not so overwhelming that it could not be said there was no reasonable possibility that the confessions might have contributed to conviction. People v. Cassisa, 309 N.Y.S.2d 727, 6 CLB 410.

§9.00. What constitutes a search

Court of Appeals, 5th Cir. Where there is a legitimate reason to do so, the mere checking of the serial number of an automobile in order more positively to identify it is not a "search" within the prohibitions of the Fourth Amendment. United States v. Johnson, 413 F.2d 1396, 6 CLB 48.

Court of Appeals, 7th Cir. Sheriff's retention of samples of defendant's hair following routine prison haircut did not constitute unreasonable search and seizure even though there was no warrant and FBI had requested such sample. United States v. Cox, 428 F.2d 683 (7th Cir.), 6 CLB 600.

§9.02. Constitutionally protected areas

Oregon The fact that a policeman's observations (of a marijuana plant in open view in a greenhouse) were made while he was trespassing on defendant's land does not invalidate a subsequent seizure pursuant to a warrant based on those observations. State v. Brown, 461 P.2d 836, 6 CLB 229.

§9.15. — Sufficiency of underlying affidavit

New York Affidavit by Assistant District Attorney in support of search warrant that lacked identification of witness alleged to have testified before grand jury and substance of testimony before grand jury claimed as support for affiant's belief as to existence of conspiracy to prevent competitive bidding on public contracts lacked probable cause, thus requiring reversal of convictions based upon documents seized pursuant to warrant which was issued. People v. Wheatman, 304 N.Y.S.2d 904, 6 CLB 106.

New York Affidavit for search warrant that averred that an envelope containing marijuana had been received from a confidential source and that in the past, information had been received from such source and had proved reliable, was insufficient as a basis on which a search warrant could issue. People v. Ryerson, 305 N.Y.S.2d 91, 6 CLB 171.

§9.30. — Manner of execution

Court of Appeals, 2nd Cir. Although moving affidavits failed to contain positive statement that property sought was in places to be searched and warrants lacked specific direction that they might be served at any time, failure of officers executing warrants which were otherwise valid to wait until morning before searching motel rooms known to be unoccupied was harmless error and did not require exclusion of evidence seized. United States v. Ravich, 421 F.2d 1197, 6 CLB 355.

Court of Appeals, 2nd Cir. Where officers waited 9 days before executing a search warrant because they could not be sure that the sought for narcotics would be present in the absence of the defendant, there was no undercutting of the policy requiring independent judicial determination of probable cause, and delay did not vitiate warrant. United States v. Dunnings, 425 F.2d 836, 6 CLB 459.

Court of Appeals, 9th Cir. Execution of federal search warrant within ten days of issuance satisfies warrant's "forthwith" direction so long as probable cause is not, in the interim, dissipated. United States v. Nepstead, 424 F.2d 269, 6 CLB 458.

§9.33. — Justifiable seizure

New York Weapons found during execution of a search warrant were contraband; and their seizure and arrest of defendants for their possession were justified even though warrant only authorized seizure of narcotics. People v. Moss, 312 N.Y.S.2d 417, 6 CLB 524.

§9.35. — Items seizable

New Mexico Seizure of trousers and boots found during search conducted pursuant to warrant issued for search of defendant's premises for coins taken from school safe in burglary was unreasonable, even though these articles may have been in plain view, and appeared to bear insulating material of the type torn from the safe during the burglary. State v. Paul, 458 P.2d 596, 6 CLB 57.

§9.40. — Necessity of obtaining a warrant

United States Supreme Court Where Federal statute provided only a fine for refusal of retail liquor dealer to allow Federal agents to inspect premises, action of Federal agents in forcibly entering storeroom without a warrant upon dealer's refusal to unlock it was improper, and could not otherwise be justified under the Fourth Amendment. Colonnade Catering Corp. v. United States, 25 L Ed.2d 60, 6 CLB 397.

Arizona Police officer's opening of first class letter without search warrant after it had been delivered but before it had been actually received by addressee was violation of Fourth Amendment. State v. Hubka, 461 P.2d 103, 6 CLB 170.

§10.00. Search incident to a valid arrest — in general

Court of Appeals, 10th Cir. A state police officer is authorized to arrest military personnel without a warrant for military offenses. Myers v. United States, 415 F.2d 318, 6 CLB 81.

United States Supreme Court Search of rear bedroom cannot be justified as incident to defendant's arrest on front steps outside of house. Vale v. Louisiana, — U.S. —, 6 CLB 399.

Court of Appeals, 8th Cir. Where arrest occurred a few moments after warrantless search but police had probable cause to make the arrest prior to the search, order of taking place was unimportant and the events could be viewed as contemporaneous. United States v. Taylor, 428 F.2d 515 (8th Cir.), 6 CLB 598.

§10.10. — Probable cause

Court of Appeals, 2nd Cir. Agent, whose observations at 8:00 P.M. confirmed reliable informant's statement that defendant would meet with unknown man at 10:30 P.M. at certain intersection, and that defendant would deliver heroin to a man at 10:30 P.M. and who observed defendant leaving her apartment at 10:25 P.M., park one block away from the intersection and look around in all directions, had probable cause for arrest of defendant, and thus search of her person at the time of her arrest, was lawful. United States v. Malo, 417 F.2d 1242, 6 CLB 291.

Maryland Defendant's "clandestine identification" of himself ("It's me") at door of apartment in which, moments later, illegal lottery paraphernalia was found gave the police probable cause to believe that defendant was a participant in the misdemeanor being conducted in their

presence. Iannone v. State, 267 A.2d 812, 6 CLB 524.

Court of Appeals, 5th Cir. Probable cause to search for a hidden compartment in an automobile could not be based upon defendant's nervousness and the contrast between the presence and lack of dust in two separate spots of the trunk of his car. Valenzuela-Garcia v. United States, 425 F.2d 1170, 6 CLB 457.

New York Landlady's information to police that she believed a pot party was in progress, and officers' detection of an odor of marijuana outside the door of defendant's apartment were not sufficient to justify warrantless search of premises by police officers after their unannounced entry with pass key, and evidence seized during search would be suppressed. People v. Madow, 303 N.Y.S.2d 974, 6 CLB 60.

New York Police officer had probable cause to arrest defendant and seize television set he was carrying after an unknown man approached the officer and pointed out defendant as just having burglarized a home and after he checked out defendant's story and learned that it was untrue. People v. Land, 307 N.Y.S.2d 170, 6 CLB 369.

Washington Where police department had received numerous complaints relating to defendant, and police officers observed defendant following pattern of conduct of meeting different women at parking lot, walking to apartment house with them, staying approximately two hours and then walking back to parking lot, and police officer positively identified defendant as person described in police files as an abortion suspect, officer had probable cause to arrest defendant for performing unlawful abortion and woman's testimony given to officers after defendant's arrest admitting that abortion had been performed on her would not be suppressed. State v. Isham, 461 P.2d 569, 6 CLB 229.

§10.20. — Manner of making arrest or entering premises as affecting validity of subsequent arrest or search

California Officer's nighttime entry through open door into defendant's residence without defendant's permission, after finding marijuana plant in backyard and seeing defendant asleep inside, constituted a "breaking" within demand and explanation statute. Arrest and subsequent search were unlawful; and evidence obtained in such search was inadmissible. People v. Bradley, 460 P.2d 129, 6 CLB 105.

Alabama Asserted general propensity of narcotics violators to destroy evidence as soon as they are aware of presence of police does not justify unannounced forcible entry into a house under a search warrant. Reynolds v. State, 238 So.2d 557 (Court of Criminal Appeals of Alabama), 6 CLB 608.

California Non-compliance with a "knock and notice" statute renders a subsequent search unreasonable and fruits thereof must be suppressed; wife's giving police permission to enter house which she jointly occupied with husband did not excuse compliance with statute where she was not at home at the time of their entry. Duke v. Superior Court, 461 P.2d 628, 6 CLB 227.

§11.00. Consent — in general

Illinois Finding by trial court that there was no free and deliberate waiver of right to require a search warrant was reasonable where evidence showed that manager of premises was confronted by officers who had already discovered bingo equipment and had advised him that they had been informed of other gambling equipment. People v. Clark Memorial Home, 252 N.E.2d 546, 6 CLB 168.

Court of Appeals, 9th Cir. Intelligent waiver of known right to be safe from illegal searches and seizures cannot be conclusively presumed from verbal expression of assent but must be determined by court from all the circumstances. United States

v. Payne, 429 F.2d 169 (9th Cir.), 6 CLB 599.

Nebraska Admission of blood test, which was taken during time when defendant who was charged with driving automobile while under influence of intoxicating liquor, was patient in hospital after automobile accident and before he was arrested or taken into custody, was error since there can be no implied consent without an arrest or custodial situation. State v. Baker, 171 N.W.2d 798, 6 CLB 228.

§11.05. — Need for warning

Court of Appeals, 5th Cir. Consent to a search, conducted without either a warrant or probable cause, was not given intelligently and voluntarily where officers did not inform defendant that his consent was necessary, and that the search could not and would not be conducted without it. Perkins v. Henderson, 418 F.2d 441, 6 CLB 350.

Pennsylvania Tactics of police officer in securing weapon for ballistics test in murder prosecution by asking financially pressed defendant, after he had been warned of right to counsel and right to remain silent, whether he owned any guns and offering to sell gun for defendant to raise cash were not improper, and gun, holster and bullets were properly admitted into evidence. Commonwealth v. Brown, 261 A.2d 879, 6 CLB 359.

§11.10. — Third party consent

Court of Appeals, 5th Cir. Where defendant's wife, who was in joint occupancy of premises gave consent to inspection of vehicle parked in yard, officer's presence was not unlawful. United States v. Johnson, 413 F.2d 1396, 6 CLB 48.

Michigan The father of a 17 year old school boy who was living at home and being supported by his parents could not effectively consent to a warrantless search for narcotics of son's room where the father himself had no personal or punishable involvement in the crime suspected or charged. People v. Flowers, 179 N.W. 2d 56 (Court of Appeals of Michigan), 6 CLB 609.

§11.30. — Voluntariness of consent

Alabama Where defendant's consent to the search of his automobile was the result of a police officer's suggestion that if he would consent, any suspicion as to possession of "dope" would be cleared up, and defendant, a serviceman, could be on his way to Viet Nam without his record being flagged, the consent to search was involuntary. Rueffert v. State, 237 So.2d 520, 6 CLB 468.

Colorado Only requirement of intelligent consent to search is that the person giving the consent know that he may properly refuse to give his permission to a search conducted without a warrant. Phillips v. People, 462 P.2d 594, 6 CLB 230.

§12.00. Stop and frisk.

United States Supreme Court Postal authorities' twenty-nine hour detention of first class mail for investigation and securing of search warrant was, under the circumstances of the case, not an unreasonable search or seizure. United States v. Van Leeuwen, 25 L Ed.282, 6 CLB 399.

California A detention based on "a mere hunch" is unlawful, even though the officer may have acted in good faith. Irwin v. Superior Court of Los Angeles County, 462 P.2d 12, 6 CLB 230.

Massachusetts Facts that police knew that an armed robbery had been committed in a nearby town a few hours before; that defendant and his companions were strangers who had not made their appearance in area until right after robbery; that a maroon station wagon was involved in the robbery, and that such a car was parked not far from where the police first observed defendant and his companions justified "threshold" inquiry of defendant and companions; and the ten or so minutes taken to allow witness to appear and make identifications while police were questioning defendant and others

were, under circumstances, reasonably part of the threshold inquiry. Therefore, the subsequent arrest of the defendant based upon the witness' identification was valid. Commonwealth v. Salerno, 255 N.E.2d 318, 6 CLB 369.

§13.00. Search by private person

Court of Appeals, 9th Cir. A search and seizure by off-duty out-of-state police officer in the presence of local forest ranger, resulting in an arrest by forest ranger, is a governmental action entitling defendant to constitutional safeguards. 6 CLB 599.

New York School officials stand in *loco parentis* to students, and warrantless search for narcotics may be a reasonable exercise of supervisory power. People v. Stewart, 313 N.Y.S.2d 253, 6 CLB 523.

New York Exclusionary rule does not apply to evidence seized by private person who is not acting in concert with police. People v. Stewart, 313 N.Y.S.2d 253, 6 CLB 523.

§13.50. Search of parolees

Court of Appeals, 10th Cir. Police who arrested the defendant in his home for a parole violation were not justified in making an immediate warrantless search of the entire home. United States v. Baca, 417 F.2d 103, 6 CLB 150.

Court of Appeals, 2nd Cir. Fourth Amendment exclusionary rule is not applicable to a parole revocation proceeding since (1) it is not an adversary proceeding, (2) a parolee remains within the custody of the Attorney General, and (3) the rule "is a needed, but grudgingly taken medicament," of which "no more should be swallowed than combat the disease." United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161, 6 CLB 514.

§14.00. Border searches

Court of Appeals, 5th Cir. "Border" inspections do not require probable cause; but where there was no constant surveillance from the border to the actual place of search 48 miles further on, search could not be construed as such an inspection. Valenzuela-Garcia v. United States, 425 F.2d 1170, 6 CLB 457.

Court of Appeals, 5th Cir. A warrantless search of defendant's stomach by means of an emetic administered by Customs officials was reasonable where (1) a demonstrably reliable informer told Customs that defendant and a companion had bought heroin in Mexico and would try to smuggle it into the country that day in their stomachs; (2) the defendant was known to be then in Mexico and a confirmed addict; and (3) the companion had just regurgitated a container of heroin at the same border crossing. United States v. Briones, 423 F.2d 742, 6 CLB 408.

Court of Appeals, 9th Cir. Fact that defendant, when passing through pedestrian line at Mexican border, "tilted his head" and "shied away" when about five feet from Customs inspector, and appeared nervous when inspector asked him routine questions did not justify real suspicion that defendant was concealing something on his person or warrant strip search of defendant; and heroin recovered from defendant's stomach four hours after emetics were administered after customs officer saw needle marks on defendant's arms during strip search was product of illegal search. United States v. Guadalupe-Garza, 421 F.2d 876, 6 CLB 355.

Arizona A search of defendant's rectum pursuant to a properly issued warrant need not be conducted in the presence of counsel (citing *Schmerber* v. *California*, 384 U.S. 757). State v. Ramos, 463 P.2d 91, 6 CLB 226.

§14.10. Plain view (See also §9.00.)

California Police officer's discovery and seizure of marijuana plants under a tree in yard adjacent to defendant's residence, pursuant to tip from unreliable informant, did not violate Fourth Amendment prohibition against unreasonable searches and seizures. People v. Bradley, 460 P.2d 129, 6 CLB 105.

§15.00. Official governmental inspection

New York Where package containing marijuana was not mailed first class, both sender and addressee consented, under regulations pertaining to inspection of all classes of mail other than first class, to inspection and search of package; and seizure that ensued upon search of package could not be attacked upon grounds that there was no probable cause for the search. People v. Garcia, 309 N.Y.S.2d 721, 6 CLB 417.

§16.00. Automobile searches

United States Supreme Court Where police, following arrest of occupants of automobile with probable cause to believe they had committed robbery, had probable cause to believe evidence of crime would be found in automobile, warrantless search of automobile was reasonable under the Fourth Amendment even though it was conducted at the station house several hours after the occupants' arrest. Chambers v. Maroney, – U.S. –, 6 CLB 398.

Court of Appeals, 8th Cir. The exception to the general Fourth Amendment rule against warrantless searches and seizures applicable in certain situations where vehicles are involved, extends to motor vehicles parked wholly upon the premises of defendant irrespective of the doctrine of curtilage. 6 CLB 598.

Arizona Where police, having probable cause, arrested defendant and his companions who were sitting in a parked automobile and removed them from the scene, narcotics discovered in car by police in subsequent warrantless search would have to be suppressed, since there was sufficient time to obtain a search warrant and no overriding necessity to search the vehicle without a warrant. State v. Snyder, 467 P.2d 943, 6 CLB 417.

District of Columbia Arrest of defendant for driving without a license did not give police valid basis for impounding car; the "inventory" search which followed was therefore unreasonable and its fruits were properly suppressed. United States v. Pannell, 256 A.2d 925, 6 CLB 57.

Maryland Warrantless search of automobile 30 minutes after its occupants had been arrested for curfew violations upheld where there was probable cause to believe that car contained contraband. Johnson v. State, 257 A.2d 756, 6 CLB 107.

Nebraska Evidence obtained as a result of an inventory of a properly impounded car is admissible at trial. State v. Wallen, 173 N.W.2d 372, 6 CLB 304.

New York The search of a car ten minutes after defendant had been safely put into custody in the station house without a warrant was unjustified since there was no possibility that defendant would use a weapon against the police officer and no reason for the officer to formulate a reasonable belief that a search would be productive. People v. Lewis, 311 N.Y.S.2d 905, 6 CLB 524.

Texas Police may search car belonging to suspect arrested for drunk-driving, even after suspect has been removed from vehicle. Corbitt v. State, 445 S.W.2d 184, 6 CLB 108.

§17.00. Abandonment

Arkansas Defendant, who parked his car by the gas station he was burglarizing, was held to have "abandoned" the car when he took flight at sight of police. A subsequent warrantless search of the car's contents did not therefore constitute a violation of the defendant's Fourth Amendment rights. Thom v. State, 450 S.W.2d 550, 6 CLB 388.

District of Columbia Where defendant dropped shopping bag containing stolen articles on street prior to his arrest, police recovery of bag was not a "seizure" within meaning of Fourth Amendment but was merely a retrieval of abandoned property and, therefore, even if probable cause did not exist for the subsequent arrest of defendant, the shopping bag was admissible in prosecution for receiving stolen prop-

erty. Brown v. United States, 261 A.2d 834, 6 CLB 368.

§18.00. Exigent circumstances

Illinois Where police had probable cause to arrest defendant and, after not finding him in his apartment, had reason to believe that defendant and his companion were hiding in a garage or that companion had suffered same fate as murder victim, entry into garage was proper; and items discovered, which were in open view and which were reasonably thought to be connected with slaying of victim, were admissible, even though arrest was not made at such time. People v. Sprovieri, 252 N.E.2d 531, 6 CLB 169.

§20.00. Standing

Arizona Sender of first class letter has standing to challenge legality of its seizure. State v. Hubka, 461 P.2d 103, 6 CLB 170.

Florida Where a charge against defendant for possession (and sale) of marijuana grew out of a warrantless search and seizure conducted a day after the defendant's alleged possession (and sale), defendant had no standing to challenge the legality of the search since he was not present and had no connection with the premises. State v. Dylus, 238 So.2d 493 (District Court of Appeals of Florida, Second District), 6 CLB 608.

New York Person occupying apartment from which confidential informer was alleged to have obtained marijuana and for which search warrant issued has standing to challenge legality of search. People v. DeLissovoy, 305 N.Y.S.2d 93, 6 CLB 171.

§21.10. The evidentiary hearing — burden of proof

New York Where the detective at the suppression hearing testified that he saw the defendant whom he knew from a prior arrest, and asked the defendant what defendant had "this time" and defendant put glassine envelopes with narcotics on the counter, burden was on the prosecution to show that defendant's consent had been freely and lawfully given, and court erred in placing the burden of proof on the defendant. People v. Whitehurst, 25 N.Y.2d 389, 6 CLB 368.

New York Defendant who according to arresting officer, "dropped" a container of marijuana to the ground at the approach of the officer had burden of proof on motion to suppress. 6 CLB 607.

New York In reluctantly accepting policeman's version of facts (that defendant had dropped a container of marijuana to the ground) rather than that of defendant (that he had been illegally searched), trial judge called for recognition of practice of police "perjury" in "dropsy" testimony cases. People v. McMurty, 314 N.Y.S.2d 194 (Criminal Court of the City of New York), 6 CLB 607.

§21.30. — Right to hearing on truth of allegations in supporting affidavits

Court of Appeals, 2nd Cir. In the absence of evidence that a magistrate issuing a search warrant had been lied to by the authorities seeking the warrant, the defendant was not entitled to a hearing as to the truth of the facts alleged in the affidavit upon which it was issued. United States v. Dunnings, 425 F.2d 836, 6 CLB 459.

New York Under § 807, New York Code of Criminal Procedure, a motion to contravene the issuance of a search warrant (as distinguished from a motion to suppress evidence discovered under the authority of such warrant) is to be brought before and determined by the magistrate who issued the warrant, whether or not an indictment has been filed in another court. People v. Gray, 306 N.Y.S.2d 487, 6 CLB 304.

§23.10. Blood samples

Court of Appeals, 9th Cir. Driver who was required to take a blood test in connection with her arrest for drunk driving had no right to be informed that she was not required to take the test; and the

prosecutor and trial judge could properly comment at the trial on her refusal. Newhouse v. Misterly, 415 F.2d 514, 6 CLB 81.

§23.90. Statutory reporting requirements

United States Supreme Court The unconstitutionality of the Federal Tax Wagering laws is no defense to a prosecution, under 18 U.S.C. 1001, for filing a false tax return thereunder. However, the combined effect of, on the one hand, the criminal sanctions for failing to file and, on the other, the dangers of incrimination in filing a truthful return might give rise to a defense of duress. United States v. Knox, 24 L Ed.2d 275, 6 CLB 394.

United States Supreme Court Defendant may not raise the constitutionality of statute requiring non-Communist affidavits by labor union officials as defense to prosecution under 18 U.S.C. 1001 for filing false affidavit in supposed compliance with said statute. Bryson v. United States, 24 L Ed.2d 264, 6 CLB 393.

Court of Appeals, 5th Cir. *Grosso* and *Marchetti* do not apply to prosecutions for importing marijuana without invoicing or declaring it at the border; compliance with the statute would have resulted in seizure of the drug by customs agents, but could not have resulted in any prosecution. Walden v. United States, 417 F.2d 689, 6 CLB 212.

Court of Appeals, 9th Cir. In a prosecution for smuggling marijuana, defendant's privilege against self-incrimination was not violated by the 19 U.S.C.A. § 1459 *et seq.* which obliges all persons entering the United States from a foreign country to disclose to Customs all merchandise he is bringing into the country; the rationale underlying such cases as *Leary, Marchetti* and *Grosso* is held inapplicable to smuggling cases. Wynn v. United States, 422 F.2d 1245, 6 CLB 404.

California Where hit-and-run statute requires driver, before leaving scene of automobile accident in which he is involved, to furnish identity and other information to owner of property damaged in accident, driver's Fifth Amendment privilege against self-incrimination does not excuse him from compliance. But the information thereby revealed and its fruit may not be used for purposes of state criminal prosecutions. Byers v. Justice Court, 458 P.2d 465, 6 CLB 59.

§23.95. Registration requirement

United States Supreme Court Convictions of defendants for (1) selling heroin without a written order form required by 26 U.S.C. 4705(a) and (2) selling marijuana without the official order form required by 26 U.S.C. 4742(a) upheld over claims that statutory obligation to sell only pursuant to official order form violated the defendants' Fifth Amendment privilege against self-incrimination. Minor v. United States, Buie v. United States, 24 L Ed.2d 283, 6 CLB 400.

§23.98. Retroactivity of constitutional rulings

Court of Appeals, 9th Cir. The Ninth Circuit gives full retroactive effect to *Haynes* v. *United States*, 390 U.S. 85, and vacates a 1966 conviction under 26 U.S.C. § 5851 for possession of an unregistered firearm. Meadows v. United States, 420 F.2d 795, 6 CLB 351.

§24.00. Length of delay

Georgia Where, after several continuances were obtained by the defendant, the prosecution obtained additional continuances on the ground that the prosecuting witness was in Viet Nam, and finally moved to have the case placed upon the dead docket (which, in effect, would amount to indefinite postponement of prosecution reinstateable by the court at any time), the defendant was deprived of his right to a speedy trial. Newman v. State, 175 S.E.2d 144, 6 CLB 468.

Maryland Defendant who was indicted on January 30, 1968, and who filed series of motions for dismissal, discovery, inspection and particulars, for reduction of bail and change of attorneys, and whose first

trial on August 14, 1968, was declared a mistrial, and who was retried on October 7, 1968, was not denied constitutional right to speedy trial. Westmoreland v. State, 261 A.2d 35, 6 CLB 294.

Maryland Seventeen month delay in bringing youth to trial in a capital case, all attributable to the state, denied him his constitutional right to a speedy trial. Wilson v. State, 259 A.2d 553, 6 CLB 233.

New York Eleven month delay between indictment and arraignment deprived defendant of his right to a speedy trial where delay was solely attributable to failure of district attorney to arrange to have the defendant brought in from another state where the district attorney knew he was sitting in jail. People v. Wallace, 310 N.Y.S.2d 484, 6 CLB 468.

§24.02. Nature of delay

Florida Where a defendant filed three successive demands for speedy trial but was not tried for three successive terms of the court due to crowded court docket, the protective provisions of speedy trial statute were not tolled since such delay was not caused by defendant. The criminal prosecution was ordered dismissed. State *ex rel.* Leon v. Baker, 238 So.2d 281 (Supreme Court of Florida), 6 CLB 609.

Illinois Defendant may waive his right to speedy trial by failing to object to delays occasioned by a co-defendant with whom he has been jointly indicted and is to be jointly tried. People v. Nowak, 258 N.E.2d 313, 6 CLB 417.

§24.05. Computation of delay

Illinois Statutory amendment providing that if a person is held upon more than one charge and is tried as to one offense, the State has an additional 120 day period following complete disposition of the first trial before commencing action on the other charges could not be given retroactive application. People v. Olbrot, 254 N.E.2d 849, 6 CLB 306.

Illinois Where defendant was arrested on January 6, 1967, and indicted on February 6, 1967, and was not brought to trial on that charge within the required statutory period of 120 days from the date of arrest, he was entitled to dismissal of indictment notwithstanding the fact that he had obtained a continuance on May 22, 1967, and in April and May, 1967, had been tried on another indictment. People v. Olbrot, 254 N.E.2d 849, 6 CLB 306.

§24.10. Duty of prosecutor to obtain defendant from another jurisdiction

Illinois Fact that state defendants seeking mandamus were federal prisoners, did not relieve state from responsibility of affording a speedy trial or trial court from properly disposing of their motion to dismiss charges, and if motion was overruled after hearing, from setting case for trial. People *ex rel.* Mathes v. Carter, 252 N.E. 2d 543, 6 CLB 172.

Michigan Where after defendants' arrest in Illinois on another charge, Michigan authorities acted with reasonable diligence and good faith in attempting to obtain custody of defendants, defendants were not deprived of speedy trial. People v. Ferrazza, 171 N.W.2d 658, 6 CLB 233.

§24.20. Demand for speedy trial as prerequisite to motion to dismiss

Tennessee Where indictment which had been "retired" when defendant was convicted under another indictment was reinstated almost four years later when defendant was granted a new trial, defendant, by pleading guilty to reinstated indictment, waived his right to raise denial of speedy trial claim. State of Tennessee *ex rel.* Lewis v. State, 447 S.W.2d 42, 6 CLB 172.

§24.25. Delay in instituting prosecution

Court of Appeals, 3rd Cir. Fact that the offense with which defendant was charged occurred in May, 1964, and he first learned he was being sought in September, 1967, did not result in prejudicial delay where the primary witness was a lifelong acquaintance of defendant; other witnesses

which the defendant could not call because of lapse of time could not have materially aided his case; and the government's efforts to commence the prosecution were thorough, sound, and in good faith. United States v. Childs, 415 F.2d 535, 6 CLB 96.

Michigan An unexplained and unjustified 42-day delay between an illegal narcotics sale and defendant's arrest impaired his ability to preserve and prepare his defense in violation of his right to a fair and speedy trial. People v. Hernandez, 170 N.W.2d 851, 6 CLB 58.

§25.00. Right to counsel

Court of Appeals, 4th Cir. Accused's right to aid of counsel at lineup does not extend beyond actual confrontation between accused and victim or witnesses of crime to interrogation of them once actual confrontation is completed. United States v. Cunningham, 423 F.2d 1269, 6 CLB 405.

Court of Appeals, 3rd Cir. An accused person has the right to the presence of counsel at a pre-trial photographic identification conducted after he has been taken into custody. United States v. Zeiler, 427 F.2d 1305, 6 CLB 511.

Court of Appeals, 4th Cir. The showing of a photograph of a lineup separately to two eyewitnesses to a bank robbery who were not able to be present for the lineup (at which defendant was represented by counsel) was not impermissible in the absence of a showing of unfairness despite the absence of defendant or his counsel at such a showing. United States v. Collins, 461 F.2d 696, 6 CLB 89.

Indiana *Wade-Gilbert* principle requiring presence of counsel at lineup confrontation was not applicable where immediately after police had taken assault victim to hospital, they returned to scene, arrested defendant and two companions and immediately took defendant to hospital to be identified by victim. Jones v. State, 255 N.E.2d 219, 6 CLB 364.

§25.01. Showups

Illinois Showups in victim's hospital room several days after the alleged robbery and battery, in which only one person in addition to the two defendants was brought in for identification by the victim was justified by fact that victim remained in hospital for a period of five months. People v. Boyce, 252 N.E.2d 71, 6 CLB 98.

New York A show up identification conducted three days after commission of the crime, without the showing of compelling circumstance, was so suggestive and conducive to an erroneous identification that it violated due process of law and required a preliminary hearing to determine whether an in-court identification would have independent value. People v. Rahming, 311 N.Y.S.2d 292, 6 CLB 465.

§25.02. Suggestiveness

Court of Appeals, 4th Cir. Although five of fourteen photographs shown to robbery witness were of defendant and two were of co-defendant and the only colored photos shown were of them and a third defendant, photographic identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. United States v. Cunningham, 423 F.2d 1269, 6 CLB 405.

Illinois. Where a lineup consisted of five Negro men in addition to the two Negro defendants, all of whom were about the same age, and one participant in addition to one of the defendants had processed hair, line-up was not so suggestive as to deprive defendants of due process of law. People v. Boyce, 252 N.E.2d 71, 6 CLB 98.

Illinois Indentification of defendant at lineup where three of four other men included in lineup were close in age to defendant and were physically similar to defendant was valid despite fact victim had failed to identify photo of defendant immediately following the crime and had failed to recall any identifying marks on defendant's face, and despite the fact that

defendant wore at the lineup the same clothes that victim had stated perpetrator was wearing at time of crime. People v. Woods, 252 N.E.2d 717, 6 CLB 221.

Illinois Where robber wore black trench coat during commission of crime and defendant was only person wearing black trench coat in lineup from which he was identified by complaining witness, defendant's attire did not emphasize him in such a manner as to fatally taint the identification. People v. Wicks, 252 N.E. 2d 698, 6 CLB 220.

Maryland Identification after a one-to-one confrontation at preliminary hearing, at which police formally accused defendant of the crime, was unconstitutionally suggestive. Coleman v. State, 258 A.2d 42, 6 CLB 99.

Massachusetts Where eyewitness to crime committed two hours earlier was brought by police to street corner where defendant and two others were being questioned and that group was surrounded by ten onlookers and no one was under visible restraint, and witness singled out two men as persons she had observed at the scene of the crime and whose pictures she had picked out from display of a dozen photographs after the crime had been committed and before coming to identify the men in the street, in-court identification by witness was not inadmissible on theory that street confrontation was so unnecessarily suggestive and conducive to mistaken identification that accused was denied due process of law. Commonwealth v. Salerno, 255 N.E.2d 318, 6 CLB 369.

Washington Fact that one photo of defendant included description of his height, weight and color of hair while no other photo in group shown to victim had such information likewise did not unduly emphasize defendant's identity, where victim first identified the defendant through the photo not containing such descriptive information and testified that he had not seen the description on the photo in question. State v. Rowe, 468 P.2d 1000, 6 CLB 414.

Washington Use of two photos of defendant in photographic identification by victim did not unduly emphasize defendant's identity, where victim was shown total of 12 photos, and where one photo of defendant showed him clean shaven and the other showed him bearded. State v. Rowe, 468 P.2d 1000, 6 CLB 414.

§25.30. Prior identification as affecting courtroom identification

Court of Appeals, 2nd Cir. Showing of defendant's photograph to two witnesses four months after the alleged incident and then immediately thereafter allowing witnesses to view a lineup in which defendant was present without an attorney do not qualify as a suggestive pretrial identification. Defendant had been arrested at the scene of the crime in view of witnesses. He had not been free and out of sight of the witnesses for any period which would have permitted suggestive procedures and practices to have had an effect. Because of these facts, no matter how unfair subsequent pretrial identification procedures may have been, they could not have had a prejudicial effect on the witnesses' identification of the defendant. United States v. Culotta, 413 F.2d 1343, 6 CLB 47.

Court of Appeals, 4th Cir. Admission into evidence of eyewitness courtroom identification of defendant, claimed by defendant to be tainted by jailhouse confrontation violative of due process, was not error where witness testified that at jail she was not positive that defendant was the man who committed the crime because when she saw him at jail he was clean shaven and shorn, while the man she had first seen at crime had long hair and mustache, and that she was able to identify him at trial because he again had a mustache and a full head of hair. United States v. Frazier, 417 F.2d 1138, 6 CLB 288.

§30.00. Arrest

Maryland Apprehension of defendant by bail bondsman outside of the state was

legal where defendant had failed to appear and bail bond had been forfeited. Frasher v. State, 260 A.2d 656, 6 CLB 294.

§32.75. Right to bail — justification of sureties, etc.

New York In *habeas corpus* proceeding, court may review action of *nisi prius* court in denying bail or fixing amount of bail if it appears that constitutional or statutory provisions prohibiting excessive bail or arbitrary refusal of bail have been violated. People *ex rel.* Klein v. Krueger, 307 N.Y.S.2d 207, 6 CLB 355.

New York Where main basis for denial of bail to accused was danger to potential witnesses, but crime charged was conspiratorial and involved several individuals, it was not rational to believe that witnesses would be any safer if the accused were kept in jail. Action of Appellate Division in *habeas corpus* proceeding in fixing bail instead of upholding denial of bail by *nisi prius* court was not error. People *ex rel.* Klein v. Krueger, 307 N.Y.S. 2d 207, 6 CLB 355.

New York Where defendant charged with murder was reported by witnesses to have a good reputation and a good job waiting for him on release, and had a family dependent upon him; and where defendant gave testimony which together with that of other witnesses before grand jury indicated serious issues involving questions of self-defense, lack of intent, and accident, defendant would be granted bail in the amount of $10,000. People v. Terrell, 309 N.Y.S.2d 776, 6 CLB 409.

Texas Defendant must show that an effort had been made to meet bail in the amount fixed before a court will decide whether that bail is excessive. *Ex parte* Jones, 449 S.W.2d 59, 6 CLB 295.

§32.80. — Forfeiture of bail

Court of Appeals, 9th Cir. Except in capital cases or where there is sufficient risk of non-appearance, accused persons shall be released on personal recognizance or upon execution of an unsecured appearance bond; and forfeitures thereunder should bear a reasonable relationship to the cost and inconvenience to the government occasioned by the default. United States v. Kirkman, 426 F.2d 747, 6 CLB 505.

§33.70. Subpoenas — constitutional limitations

Florida Where, in connection with an investigation of corporations supposedly dominated by "organized crime," subpoena *duces tecum* were issued to produce all the records of these corporations from the date of their inception, said subpoenas amounted to "fishing expeditions," were entirely too broad in scope, and violated constitutional guarantees against unreasonable searches and seizures and self-incrimination. Subpoena *duces tecum* are governed by the same principles of law as search warrants. Imparato v. Spicola, 238 So.2d 503 (District Court of Appeals of Florida), 6 CLB 610.

§34.20. Motions addressed to indictment or information — sufficiency of indictment

District of Columbia A complaint which purports to charge a violation of an unlawful assembly statute is defective unless it alleges that the assembly threatened to cause a breach of the peace. Adams v. United States, 256 A.2d 563, 6 CLB 58.

Court of Appeals, 1st Cir. Failure of indictment for violating "loan sharking" provisions of Federal Consumer Credit Protection Act to specify means by which alleged threats were communicated, location of alleged offense and name of victim, when taken together, deprived defendant of sufficient description of the act to enable him properly to defend against accusation and required reversal of conviction. United States v. Tomasetta, 429 F.2d 978 (1st Cir.), 6 CLB 593.

New York Where criminal information is sufficient on its face but is not designated as made on information and belief, and it develops on trial that informant did not have personal knowledge of all the material allegations, defendant is entitled to

dismissal even though the prosecution is able to prove the case beyond a reasonable doubt by other evidence. The case must further be dismissed even where attempts are made by the prosecution to file subsequent depositions and other affidavits in support of the information prior to or at trial. People v. Bohoy, 307 N.Y.S. 2d 254, 6 CLB 365.

Oregon The prosecution does not remedy the infirmities of a statute already declared unconstitutionally vague "on its face" by filing an informaton under that statute which sets forth the acts complained of in minute detail. State v. Mason, 459 P.2d 889, 6 CLB 106.

§34.21. Duplicity and multiplicity

Oregon An armed robbery of two persons at the same time and place constitutes two separate crimes, and may therefore be charged in two separate counts of an indictment. State v. Gratz, 461 P.2d 829, 6 CLB 227.

§34.30. — Bill of particulars

New York Trial court abused its discretion in prosecution for felonious sale of narcotics by denying defendant's demand for a bill of particulars specifying exact time and place of commission of crime where defendant contemplated use of alibi defense and the *People* demonstrated no prejudice that might result from disclosure. People v. Richardson, 309 N.Y.S.2d 699, 6 CLB 410.

§35.10. Discovery — statement of the defendant

Court of Appeals, 5th Cir. Government did not violate trial court's pretrial discovery order by failing to produce defendant's oral confession. Sheer v. United States, 414 F.2d 122, 6 CLB 47.

Court of Appeals, 5th Cir. Rule 16(a)(1), F.R.Cr.P., which allows for discovery and inspection of defendant's "written or recorded statements or confessions" includes discovery of defendant's statements made in a secretly recorded conversation with a government informant. Such tape recordings are not to be considered statements of the informant who made the recording. They therefore do not fall within the scope of the Jencks Act, 18 U.S.C.A. §3500 and are not exempt from pretrial discovery by the defendant under Rule 16(b), F.R.Cr.P. Davis v. United States, 413 F.2d 1226, 6 CLB 48.

§35.50. — Records, films, tape recordings, etc.

New York Trial court did not abuse its discretion in denying defendant access to records relating to services of informants, since defendant knew the name of the informant to whom he had allegedly sold the dangerous drug (sufficient to plead defense of entrapment), and since there was nothing in record to demonstrate that prosecution file contained evidence material to his defense. People v. Cleary, 305 N.Y.S.2d 384, 6 CLB 219.

§36.00. Severance

Court of Appeals, 10th Cir. Rule permitting joinder of offenses in same indictment if they are of the same character does not apply to cases where more than one defendant is joined in the same indictment. Hence, where one defendant was charged in two counts with violations of statutes prohibiting transportation of stolen goods in interstate commerce but was not charged in a third count as was the codefendant with violation of statute prohibiting transportation of stolen vehicles in interstate commerce, there was a misjoinder of defendants and the defendant's conviction had to be reversed. United States v. Eagleston, 417 F.2d 11, 6 CLB 150.

Court of Appeals, 5th Cir. It is deprivation of due process for a trial judge to refuse severance and later trial of a codefendant, where granting relief would create strong likelihood that codefendants would give exculpatory testimony and where their own confessions raised substantial doubts as to defendant's guilt. Byrd v. Wainwright, 428 F.2d 1017 (5th Cir.), 6 CLB 601.

§36.10. Change of venue

Wisconsin In motion for change of venue, where defense introduced public opinion survey showing that twenty-four out of sixty-four persons contacted prior to trial had concluded that defendant was guilty, and this was the only evidentiary matter of record that would tend to support the allegation of community prejudice, trial court's denial of motion for change of venue on ground that there was little likelihood of defendant not receiving fair trial was not an abuse of discretion. State v. Kramer, 171 N.W.2d 919, 6 CLB 166.

§36.25. Motions by indigent defendant — free transcript of preliminary hearing or prior trial

Court of Appeals, 2nd Cir. Denial of indigent's motion for transcript of minutes of pre-trial suppression hearing was not a violation of due process in the absence of showing of some prejudice. United States *ex rel.* Cadogan v. La Vallee, 428 F.2d 165, 6 CLB 509.

New York Denial of motion to provide indigent defendants with free copy of the minutes of a suppression hearing is, under state law, prejudicial error *per se* requiring new trial despite prosecution's contention of harmless error. ". . . The use to which a requested transcript might have been put is irrelevant." People v. Zabrocky, 311 N.Y.S.2d 892, 6 CLB 519.

§36.35. — Indigent's right to expert witnesses and investigative assistance

Court of Appeals, 10th Cir. Use of adversarial rather than *ex parte* hearing to explore defendant's need for investigative aid under 18 U.S.C.A. 3006A(e), during which defendant was compelled to disclose his case and was subjected to cross-examination by government, was error; and in view of government attorney's insistence on his alleged right of participation, lack of any affirmative objection by defendant to government's participation did not constitute a waiver. Marshall v. United States, 423 F.2d 1315, 6 CLB 407.

Court of Appeals, 10th Cir. Appointment of the F.B.I. as instrument to furnish investigative aid requested by defendant under 18 USCA 3006A(e), was error and was, further, prejudicial in view of fact that investigation resulted in location of witness whose testimony bolstered prosecution's case. Marshall v. United States, 423 F.2d 1315, 6 CLB 407.

§37.01. Plea of nolo contendere or non vult

New Jersey Trial court did not abuse its discretion when it refused defendant's motion, after state had completed its case and one defense witness had testified, to change his plea on a charge of felony murder to *non vult*. State v. Conklin, 258 A.2d 1, 6 CLB 98.

§37.05. Equivocal guilty plea

Maryland In view of accused's statement to the court before it accepted his guilty plea that he had found motorcycle in the weeds in a drainage ditch and was going to take it to the police at the time he was stopped by the police, it affirmatively appeared that accused did not intelligently understand that offense to which he pleaded (unauthorized use of motorcycle) required criminal intent and his guilty plea should not have been accepted. Halloway v. State, 261 A.2d 811, 6 CLB 361.

§37.20. — Duty to advise defendant of possible sentence

Court of Appeals, 5th Cir. Where prior to entering his guilty plea, defendant was incorrectly advised by the prosecutor that the maximum sentence under the indictment was 75 years (it was only 35), he was entitled to a hearing on his motion to vacate his guilty plea to determine whether he knew the correct maximum from some other source. If he did not, the incorrect maximum might have been a factor in inducing the plea. Grant v. United States, 424 F.2d 273, 6 CLB 455.

§37.30. — Duty to inquire as to voluntariness of plea

Court of Appeals, 8th Cir. Court, in determining the voluntariness of the defen-

dant's plea, need not make any inquiry concerning the possible background existence of search and seizure issue, confession issue or other factor which might conceivably be considered in defense if a trial were to take place. Cantrell v. United States, 413 F.2d 629, 6 CLB 46.

Arizona Supreme Court of Arizona found that a totally deaf defendant who could lip-read had voluntarily and intelligently entered a plea of guilty to grand theft. State v. Hansen, 464 P.2d 960, 6 CLB 358.

California A prisoner who pleaded guilty prior to *Boykin* v. *Alabama,* 395 U.S. 238, must rely on pre-*Boykin* law to attack that plea; trial judge was not required to give petitioner, represented by counsel at his 1966 plea, any admonition prior to accepting the plea. In the future, a defendant must be explicitly admonished on the record that by his plea he is waiving his rights to self-incrimination, confrontation, and trial by jury. *In re* Tahl, 460 P.2d 449, 6 CLB 160.

Wisconsin The standards announced in *Boykin* v. *Alabama,* 395 U.S. 238 (1969), will not be applied retroactively in Wisconsin; a plea which was accepted in 1964 by the trial court without personally addressing defendant to determine that plea was voluntarily entered with knowledge of its direct consequences and nature of the charge will stand. Ernst v. State, 170 N.W.2d 713, 6 CLB 53.

§37.50. Involuntariness of plea — threats

Court of Appeals, 4th Cir. A revival of a prosecution, *nolle prossed* five years before, would have violated defendant's right to a speedy trial on that charge under both state and federal law; and where the prosecutor's threat to revive that prosecution was shown to have substantially motivated defendant's guilty plea to another charge, that plea could not be considered voluntary. Lassiter v. Turner, 423 F.2d 897, 6 CLB 404.

§37.80. Motion to withdraw or set aside guilty plea — grounds

Michigan Defendant, convicted upon a guilty plea of armed robbery, stated at his sentencing that he had been drinking prior to commission of the crime. The trial court's denial of motions for a new trial or a re-examination of the defendant to determine the extent of his drinking was upheld, on the ground that during the entry of the plea, the accused had admitted his specific intent to commit robbery with a gun and had remembered in detail his actions on the day in question. People v. Duncan, 170 N.W.2d 301, 6 CLB 53.

New York Defendant's claim, on writ of error *coram nobis,* that his guilty plea had been induced by threats of court officer acting on behalf of the District Attorney's office that the homosexuality of the defendant and complaining witness would be revealed did not vitiate conviction based on guilty plea, even if true, where evidence of such homosexuality would have in all likelihood been revealed at trial. People v. Dayter, 307 N.Y.S.2d 444, 6 CLB 362.

§37.90. — Right to hearing

Court of Appeals, 2nd Cir. Where it could not be ascertained from the record alone whether the defendant's ultimate decision to plead guilty to murder in the second degree under an indictment charging murder in the first degree and other offenses was due to weight of evidence against defendant or was induced by fear of the prejudicial consequences of jury's exposure to the evidence at the hearing on the voluntary nature of his pre-*Jackson* v. *Denno* confession, accused seeking *habeas corpus* relief was entitled to a hearing upon his allegation that his guilty plea was involuntary. United States *ex rel.* Comacho v. Follette, 421 F.2d 822, 6 CLB 352.

New York Where defendant, who was 17, made statement at time of sentencing on his guilty plea that could be interpreted to mean that he did not participate in robbery forming basis of felony murder charge, and defense attorney at time plea was entered had stated that there had

been "some misunderstanding" but that he thought that defendant understood what the applicable law was, and court failed to conduct inquiry as to whether defendant understood nature of charge or to discuss facts involved, defendant was entitled to hearing on petition for writ of error *coram nobis* to determine whether plea was knowingly and intelligently entered. People v. Beasley, 307 N.Y.S.2d 39, 6 CLB 362.

§41.00. Proceeding to determine defendant's competency to stand trial

Court of Appeals, 1st Cir. Where a defendant has been deemed unable to stand trial because of mental incompetence, the danger of erosion of the values protected by the right to a speedy trial requires the frequent reporting of his condition under increasingly meticulous safeguards. In re Harmon, 425 F.2d 916, 6 CLB 460.

Illinois Report of clinic that defendant knew the nature of the charge and was capable of cooperating with his counsel could not be viewed as conclusive in light of continuing manifestations of abnormal behavior. People v. Thomas, 253 N.E.2d 431, 6 CLB 214.

New Mexico Where law required showing of reasonable basis for belief of defendant's incompetency, defendant did not raise question of his competency to stand trial by merely asserting mental incompetency and alleging that he was entitled to a sanity hearing. State v. Hollowell, 461 P.2d 238, 6 CLB 155.

Washington Trial court's finding that the defendant who was charged with murder in the first degree, was not competent to stand trial because of his display of a completely inappropriate grin or half-grin on many occasions, thus evidencing the inability to convey or display emotional feelings concerning the offense with which he was charged, was an abuse of discretion, especially after the court had already concluded that the defendant appreciated his peril and could rationally cooperate with his counsel in his own defense. Physical inability of a defendant to personally express his emotional feelings was not a test of his competency to stand trial. State v. Gwaltney, 468 P.2d 433, 6 CLB 462.

Connecticut The judge designated to preside over the defendant's trial was not required to disqualify himself on the ground that 15 years earlier he had been a member of the parole board which ruled against the defendant's request for parole and might have developed animosity toward him because the defendant had vocally protested the board's decision. The court reached this result because the judge had denied any recollection of the incident which might prejudice him toward the defendant. State v. Schafer, 260 A.2d 623, 6 CLB 299.

§43.02. Disqualification of trial judge

Wisconsin The fact that the trial was conducted before the same judge who conducted the preliminary hearing did not deny defendant procedural due process; there was no showing that the judge had any direct "interest" in the outcome merely because he had presided at an earlier stage. State v. Knoblock, 170 N.W.2d 781, 6 CLB 57.

§43.10. Defendant's right to a public trial

Court of Appeals, 3rd Cir. A hearing on a motion to suppress a confession on grounds of voluntariness must be conducted in open court when it takes place during the course of the trial. United States *ex rel.* Bennet v. Rundle, 419 F.2d 599, 6 CLB 300.

Indiana Where, except to request that certain specified individuals be allowed to remain, counsel for defendant made no objection to court's order (1) excluding everyone but the press and court attendants from the courtroom, and (2) providing for separation of witnesses, and where it was not asserted that counsel was incompetent, counsel's actions amounted to a waiver of defendant's constitutional right

to a public trial. Marshall v. State, 258 N.E.2d 628, 6 CLB 416.

§43.20. Absence of defendant or his counsel

United States Supreme Court A defendant can lose his right to be present at his trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. State of Illinois v. Allen, 25 L Ed.2d 353, 6 CLB 392.

Court of Appeals, D.C. Cir. Although defendant was clearly aware that serious consequences would ensue if he failed to appear at trial after having been released in order to locate witnesses, where there was no specific warning that if he voluntarily absented himself, he would be deemed to have waived his constitutional rights to testify and to confront witnesses against him and that the trial could go on without him, cause would be remanded to afford defendant opportunity to develop factual support for contention that his absence was not truly voluntary in sense of being a waiver of a known right. United States v. McPherson, 421 F.2d 1127, 6 CLB 350.

§43.22. Due process — use of interpreters

Court of Appeals, 5th Cir. Appointment of complainant's husband to act as her interpreter in state prosecution for burglary with intent to commit rape was violation of due process, where husband had previously tried to extort money from defendant to drop case, other interpreters were available, and husband, because of nature of case, might be expected to have an emotional bias. Prince v. Beto, 426 F.2d 875, 6 CLB 508.

§43.30. Duty of trial court sua sponte to order competency hearing

Court of Appeals, 7th Cir. Defendant's statement at time of entry of guilty plea that he wanted to proceed without counsel, "but I would like to talk to somebody that has some maybe psychiatric training along the way" did not require a thorough inquiry into the defendant's ability to comprehend the situation and possibility that he might have interposed the defense of insanity. Edwards v. United States, 422 F.2d 788, 6 CLB 404.

§43.35. Jury charge — manner of making exceptions

Court of Appeals, 3rd Cir. It is reversible error for trial judge to refuse to allow defense counsel to make his exceptions to judge's charge out of the hearing of the jury unless the government can affirmatively demonstrate an absence of prejudice to defendant. United States v. Schartner, 426 F.2d 470, 6 CLB 512.

§43.50. Waiver of jury trial

Arizona Where defense counsel stated in presence of defendant that defendant had indicated that he wished to waive trial by jury, failure of trial court to conduct independent personal examination of defendant concerning waiver of right and to advise defendant of his constitutional right to jury trial did not render waiver invalid as violation of due process clause of Fourteenth Amendment. Defendant, over a strong dissent, was held to have knowingly acquiesced in decision to waive jury trial by permitting his attorney in his presence and without objection on his part to waive his right to jury trial. State v. Jelks, 461 P.2d 473, 6 CLB 220.

Maryland Where the defendant's court appointed attorney answered, "By the court" when asked at the time of trial, "How does he wish to proceed?" and the only actual mention of the word "jury" had been at the original arraignment for the felony, the presumption against waiver of constitutional rights was not overcome, and the case was remanded to determine whether defendant personally waived or knowingly acquiesced in his lawyer's waiver. Zimmerman v. State, 265 A.2d 764, 6 CLB 467.

Pennsylvania Even if the defendant had been influenced by the attitude of the trial judge and his counsel when he changed his mind and decided to have a non-jury trial because he felt that there were all "mad" at him for wanting a jury trial, such influence did not constitute coercion vitiating his waiver of his right to a jury trial. Commonwealth v. Jordan, 258 A.2d 688, 6 CLB 165.

§44.00. Conduct of trial judge — in general

New Jersey Even if trial judge, through his facial expression, indicated disbelief of defense testimony, impropriety was cured by instruction that judge did not know whether or not he may have smiled or indicated surprise during the testimony of one of defendant's witnesses, but if so, the jury was not to be influenced by it. State v. Soriano, 258 A.2d 140, 6 CLB 97.

§44.10. — Examination of witnesses

Court of Appeals, 5th Cir. Defendant was deprived of a fair and impartial trial when judge cross-examined defendant and co-defendant, addressed over one hundred questions to a key defense witness, and, after the government had rested, sua sponte called a witness whose testimony impeached defendant. Such behavior comes under the "plain error" rule [Rule 52(a) F.R.Cr. P.], and no objection is needed to preserve issue for appeal. United States v. Lanham, 416 F.2d 1140, 6 CLB 149.

New Jersey Where defense witness who had been arrested and identified as person seen leaving the burglarized premises had exonerated the defendant and no evidence was introduced at trial to indicate that witness had ever made statement to police implicating defendant, it was prejudicial error for trial judge to question witness as to such alleged statement. State v. Lemon, 257 A.2d 123, 6 CLB 49.

§44.18. — Prejudicial comments

Court of Appeals, 6th Cir. The refusal of trial judge to dismiss jury panel after he admonished defendant for his belated appearance and, in presence of the jury, took issue with the statement of defendant's attorney that he had promised not to reprimand defendant in the presence of the jury for his tardiness was, at most, harmless error in view of the instruction to jury that trial judge did not intend to say anything that reflected upon character or honesty of defendant's attorney. United States v. King, 415 F.2d 737, 6 CLB 84.

New York Defendant's conviction for possession of slightly more than one quarter of an ounce of heroin was reversed and a new trial ordered, where 3-5 year sentence imposed upon defendant, a mother of three children who had never before been convicted of a crime, seemed to result from her refusal to aid in prosecution of another person and where judicial emphasis at trial on street sales of narcotics was prejudicial to defendant. People v. Smith, 310 N.Y.S.2d 99, 6 CLB 412.

Washington Judge's comment in rebuking attorney must not reflect on the integrity of counsel inasmuch as such reflection destroys effectiveness of counsel in the eyes of the jury and deprives the defendant of meaningful representation. State v. Whalen, 464 P.2d 730, 6 CLB 297.

§44.30. Cross-examination — scope

Court of Appeals, 9th Cir. Where the defendant's defense was his inability to form requisite criminal intent due to mental impairment and susceptibility to suggestion, it was error to exclude testimony of phychiatrist as to defendant's mental capacities and susceptibilities. Hughes v. United States, 427 F.2d 66, 6 CLB 506.

§44.75. — Restrictions on right of cross-examination

Court of Appeals, 7th Cir. In a narcotics prosecution, the trial court's refusal during cross-examination, to require the informer to display his arms to the jurors so that the defense could impeach the informer's assertion that he no longer used narcotics was well within the court's discretion, involving as it did a collateral matter on cross-examination. United States v. Lawler, 413 F.2d 622, 6 CLB 46.

Court of Appeals, 9th Cir. Trial court's refusal to permit cross-examination of federal narcotics agent as to incentive of informant under indictment to cooperate with government in apprehension and conviction of other narcotics violators was reversible error. Hughes v. United States, 427 F.2d 66, 6 CLB 506.

§44.77. Other restrictions imposed upon defense

Court of Appeals, 9th Cir. Trial court in joint trial acted properly in refusing to allow counsel for the defendant to comment in his closing that the co-defendant refused to testify. Such a comment, whether by the court or counsel, would impose a penalty on the co-defendant's right to remain silent and thereby impair its free exercise. The Ninth Circuit also rejected the defendant's argument that the inability of a defendant to comment on a co-defendant's refusal to testify in a joint trial is per se prejudicial because it denies him the right to present all evidence, by inference or otherwise, in his favor. United States v. De La Cruz Bellinger, 422 F.2d 723, 6 CLB 408.

§45.05. Multiple prosecutions — order

Maine Where a defendant was indicted twice in a single term for two separate crimes allegedly committed on the same day, due process did not require granting the defendant the right to elect which crime he should be tried for first. Lumsden v. State, 267 A.2d 649, 6 CLB 525.

§45.20. — Comments made during summation — in general

Court of Appeals, 6th Cir. Where co-defendant tried jointly with defendant was charged with aiding and abetting the defendant in perpetration of rape, comment upon the failure of the co-defendant to testify necessarily implicated defendant and violated the defendant's right to a fair trial. Kinser v. Cooper, 413 F.2d 730, 6 CLB 46.

California Prosecutor's statement in his summation during a penalty trial for first degree murder that defendant had, while robbing a woman in a crime for which he had previously been convicted, placed his hands down her brassiere and on her legs because "he decide[d] he want[ed] to get a sexual thrill," was held to be inflammatory and therefore prejudicial error where the testimony of the robbery victim at the penalty trial indicated only that defendant had been searching her for money. People v. Washington, 458 P.2d 479, 6 CLB 55.

Illinois Action of prosecutor during closing argument in holding shotgun in hands and telling jury to stare at him while three minutes went by was prejudicial to defendants charged with armed robbery. People v. Wicks, 252 N.E.2d 698, 6 CLB 220.

Maryland Defendant was not afforded a fair trial where defense counsel objected to prosecutor's remark in closing argument that theory of self-defense to charge of murder was fiction manufactured by defense counsel and trial court responded by saying that concluding remarks were not evidence and that prosecutor's remarks were not evidence, and where trial court did not rebuke prosecutor who interrupted defense counsel's closing argument by challenging statement by defense counsel that prosecutor's remarks in closing argument were improper. Reidy v. State, 259 A.2d 66, 6 CLB 215.

New Mexico Where district attorney in his summation stated over defense counsel's objection that "there is no evidence in this case that Ford proclaimed his innocence, or protested it at the time [he] was arrested," and where the evidence of defendant's guilt was not overwhelming, the harmless error rule was inapplicable. State v. Ford, 459 P.2d 353, 6 CLB 55.

Oklahoma Where prosecutor in his closing remarks to jury in burglary case referred to the defendant as a "state-wide operator," appellate court reduced sentence from 7 to 4 years to counteract possibility that jury may have been influ-

enced in imposing a greater punishment. Williams v. State, 471 P.2d 928 (Court of Criminal Appeals of Oklahoma), 6 CLB 603.

§45.25. — Comment on defendant's failure to testify

Court of Appeals, 6th Cir. Prosecutor's statement in summation to jury that evidence against all defendants was uncontradicted except as to two defendants who had taken the stand amounted to a prejudicial comment upon the other defendants' failure to testify. Doty v. United States, 416 F.2d 887, 6 CLB 94.

New York Where trial judge explained to jury that neglect or refusal of defendant to testify did not create any presumption against him, and where defendant's guilt was clearly established, statements made by District Attorney during summation that defendant failed to controvert any of the testimony offered by the People, assuming they were improper, did not constitute reversible error. People v. Rolchigo, 307 N.Y.S.2d 413, 6 CLB 370.

§45.30. — Comment on failure of defense to call certain witnesses

Court of Appeals, D.C. Cir. When counsel, either for the prosecution or the defense, intends to argue to the jury that an inference should be drawn from the absence of a witness within the other party's power to produce, an advance ruling from the trial court should be sought and obtained. If such an argument is to be permitted, an appropriate instruction should be given, defining for the jury the conditions under which the inference might properly be drawn. Gass v. United States, 416 F.2d 767, 6 CLB 96.

Illinois When defendant testifies as to his activities with potential witnesses during a particular period of time for the purpose of establishing an alibi, his failure to produce such witnesses is a proper subject of comment by the prosecution. People v. Garnett, 251 N.E.2d 761, 6 CLB 109.

§45.35. — Improper expression of opinion

Court of Appeals, 3rd Cir. Action of prosecutor, in invoking before a jury his experience in criminal prosecutions and the sincerity of his own personal belief in the guilt of the defendant, was reversible error. United States v. Schartner, 426 F. 2d 470, 6 CLB 512.

§45.36. — Reference to matter not in evidence

Court of Appeals, 5th Cir. Prosecutor's remarks that accused had tampered with a government's witness was improper where there was no evidence to support the accusation. Hall v. United States, 419 F.2d 582, 6 CLB 288.

§45.40. — Calling witness who prosecutor knows will claim Fifth Amendment privilege (See also §51.18.)

D.C. Ariz. The mere calling of a witness inextricably connected with the defendant, knowing that he will invoke the Fifth Amendment, did not deprive defendant of the right to confrontation, since the witness was on the stand for only a few moments and the questions he refused to answer did not tend to reflect upon the defendant's guilt. The fact that the prosecution knew that the witness would refuse to testify was held not dispositive, citing *Frazier* v. *Cupp*, 394 U.S. 731 (1969). Cota v. Arizona, 304 F.Supp. 876, 6 CLB 149.

§45.50. — Suppression of evidence

Court of Appeals, 5th Cir. Where a prosecuting attorney caused an intended defense witness to be arrested in the courtroom and jailed on a charge against him which had previously been dropped, the defendant was deprived of due process, because of the intimidating effect upon this and other witnesses at the trial. Irrespective of intention, the prosecutor's action amounted to a suppression of the evidence available to an accused. Bray v. Peyton, 429 F.2d 500 (5th Cir.), 6 CLB 590.

Court of Appeals, 9th Cir. Where prosecutor gave defense counsel a "reasonable layman's summary" of phychiatric report of complaining witness, failure to furnish him the entire report did not constitute a violation of due process. Stout v. Cupp, 426 F.2d 881, 6 CLB 515.

§45.55. —Use of perjured testimony

Maryland Failure of the prosecutor to correct co-defendant's denial on cross-examination of prosecutor's offer to him of a guilty plea to a lesser charge in return for testimony against the defendant was prejudicial error. Jones v. State, 260 A.2d 348, 6 CLB 300.

§46.00. Sufficiency of evidence — individual crimes

Arizona Where at the close of the State's case, the defendant moved for a directed verdict on the ground that the testimony of his alleged accomplice was not corroborated, and such motion was denied, and the defendant thereafter testified in his own behalf admitting to several important facts, the defendant was deemed to have waived any error in the denial of his motion, since the deficiencies in the State's case with regard to corroboration were supplied by the defendant's testimony. State v. Hanshe, 468 P.2d 382, 6 CLB 412.

§46.10. — Aiders and abettors

Court of Appeals, 9th Cir. Ninth Circuit holds that conviction of the principal is not a necessary condition precedent to conviction of accessory after the fact. United States v. Walker, 415 F.2d 530, 6 CLB 81.

Arizona Conviction for aiding and abetting a rape was not invalidated by the fact that the alleged principal was later acquitted of the rape in a separate trial. State v. Spillman, 468 P.2d 376, 6 CLB 464.

§46.40. Requirement of corroboration — Sex crimes

Tennessee Defendant's stepdaughter, with whom he had been maintaining incestuous relations, was an "accomplice" whose testimony required corroboration at defendant's incest trial. Britt v. State, 450 S.W.2d 48, 6 CLB 355.

§46.85. Chain of possession

Indiana Where, as in the case of seized or purchased narcotics, the object offered in evidence has passed out of possession of the original receiver and into possession of others, the chain of possession must be established to avoid any claim of substitution, tampering or mistake. Failure to submit such proof may result in exclusion of the evidence or testimony as to its characteristics. Graham v. Indiana, 255 N.E.2d 652, 6 CLB 360.

§46.95. Evidence received subject to connection

Court of Appeals, 2nd Cir. If hearsay be admitted in conspiracy trial "subject to connection" under the co-conspirators' exception to the hearsay rule, trial judge must determine, when all the evidence is in, whether in his view, prosecution has proved participation in conspiracy by defendant against whom hearsay was admitted by a fair preponderance of independent evidence showing such participation. If there has been such proof, jury is to consider the hearsay with all other evidence in determining guilt; if there has not, judge must instruct jury to disregard hearsay, or, if it was so large a proportion of proof as to render cautionary instruction of doubtful value, judge must declare mistrial on defendant's request. United States v. Geaney, 417 F.2d 1116, 6 CLB 287.

§47.00. Best evidence rule

Court of Appeals, 10th Cir. Photographic copies were the best evidence of incriminating coded messages sent by prisoner to fellow inmates where the originals were satisfactorily accounted for. Denson v. United States, 424 F.2d 329, 6 CLB 455.

North Carolina Where alleged written death threat bore upon the essential issue of intent in attempted rape case, it was re-

versible error (under best evidence rule) to admit testimony of victim as to its contents absent a showing of loss of and diligent search for said writing. State v. Anderson, 175 S.E.2d 729 (Court of Appeals of North Carolina), 6 CLB 604.

§47.10. Character and reputation evidence

Court of Appeals, 5th Cir. Refusal to admit testimony of character witness who had known defendant for only one month and who did not live in either of cities in which the defendant had recently resided was within trial judge's discretion and was not error. United States v. Trollinger, 415 F.2d 527, 6 CLB 86.

Court of Appeals, 6th Cir. Asking defendant's character witness whether he knew that the defendant, who was black and married, had been running around with a white go-go dancer was a deliberate attempt to employ racial prejudice to strengthen the government's case; there being no conceivable non-prejudicial explanation to this question, the case, a close one, would be remanded for a new trial. United States v. Grey, 422 F.2d 1043, 6 CLB 403.

Iowa A witness may not testify as to defendant's general reputation in the community for honesty and integrity unless he has laid a foundation which must include the witness' actually having heard comments about the defendant's character in the community; comments must have been made before the accusation of the instant crime was made public. State v. Hobbs, 172 N.W.2d 268, 6 CLB 160.

§47.20. Circumstantial evidence

Maryland Evidence that person has illegal narcotic drug in his system, though not *per se* constituting unlawful possession, would tend to show circumstantially that person was in possession of drug prior to taking it. Franklin v. State, 258 A.2d 767, 6 CLB 165.

§47.24. — Intent

Maryland Evidence was sufficient to support conviction of possession of narcotic paraphernalia, notwithstanding the fact that the defendant had been brought into the state while possessing the illegal items by bail bondsman who had no knowledge of such items, after defendant had refused to appear in the state on another matter. Frasher v. State, 260 A.2d 656, 6 CLB 294.

§47.35. — Use of prior testimony

United States Supreme Court In the absence of corporate officer's invocation of his privilege against self-incrimination or any bad faith on the part of the government, conviction of corporate officer for criminal violation based in part upon his answers to interrogatories served upon corporation in prior civil *in rem* libel action against him was not improper. United States v. Kordel, 25 L Ed.2d 1, 6 CLB 395.

Court of Appeals, 5th Cir. When witness, who had testified as to facts of the crime at first trial where he was under oath and fully examined on both direct and cross-examination, steadfastly refused to answer questions at second trial, the prosecution's introduction into evidence of witness' testimony from the first trial did not violate the confrontation clause of the Sixth Amendment. United States v. Mobley, 421 F.2d 345, 6 CLB 350.

Pennsylvania While it is true that the focus of a preliminary hearing is not that of a trial, the preliminary hearing testimony of a deceased witness may be received in evidence at trial where the defendant, at the preliminary hearing, was represented by counsel and had adequate opportunity to cross-examine. The court noted that any problem arising from the difference in focus can be pointed out to the jury and a proper cautionary instruction can be given. Commonwealth v. Clarkson, 265 A.2d 802, 6 CLB 465.

§47.36. — Dying declaration

Nevada Once the prosecution has clearly established that the declarant was in extremis and was aware of that status, the

prosecution in order to introduce dying declaration, need not also establish beyond a reasonable doubt that the dying declarant believed in an Almighty Being and a life thereafter. Under the constitutional provision concerning free exercise and enjoyment of religious worship, the courts are precluded from adopting any rule that would impinge upon the liberty of conscience, and that applies equally to the dead as well as to the living. Wilson v. State, 468 P.2d 346, 6 CLB 465.

§47.37. —Guilty pleas of co-defendants

§47.45. — Declarations of co-conspirators

New Mexico In a prosecution for criminal abortion resulting in death, the statement of the victim that she was going to see the defendant about having an abortion would be admissible if at the time of saying it she had already entered into a conspiracy with the defendant to have the abortion performed on her, but inadmissible as hearsay if made prior to that. State v. Farris, 470 P.2d 561, 6 CLB 462.

Ohio Co-conspirator's out of court statement, made while he was in custody, and after the conspiracy had terminated and not in furtherance of the conspiracy, was inadmissible at trial of other co-conspirators both under the general hearsay rule and because of lack of opportunity to confront and cross-examine declarant, where the statement had not been made in their presence and where the co-conspirator was not a witness at the trial. State v. Jones, 258 N.E.2d 258, 6 CLB 414.

§47.70. — Presumptions and inferences

United States Supreme Court Statutory presumptions contained in 21 U.S.C. 174 and 26 U.S.C. 4704(a) are constitutionally valid as to heroin but invalid as to cocaine. Turner v. United States, 24 L Ed. 2d 610, 6 CLB 402.

Delaware Statute which makes presence at the scene of a riot without attempting to suppress it *prima facie* evidence of participation in the riot is unconstitutional. In light of the many plausibly innocent explanations of presence at the scene, mere presence may not be made the basis of an almost irrebutable presumption. State v. Ayers, 260 A.2d 162, 6 CLB 307.

Missouri Possession by defendant of stolen ring fourteen days after its theft was "recent" enough to invoke presumption of recent and exclusive possession. State v. Chase, 444 S.W.2d 398, 6 CLB 55.

§47.80. — Res gestae and spontaneous declarations

California For purposes of spontaneous declaration exception to hearsay rule, neither lapse of time between event and declarations nor fact that declarations were elicited by questioning deprived statements of spontaneity if statements nevertheless appeared to be made under stress of excitement and while reflective powers were still in abeyance. People v. Washington, 459 P.2d 259, 6 CLB 53.

Texas Testimony as to acts of forced oral sodomy which took place before and after the rape was admissible at the trial for rape as being part of the *res gestae* of that offense. Johnson v. State, 449 S.W.2d 65, 6 CLB 298.

Texas Where victim of robbery was taped over the eyes so that he could not see whether or not defendant was present in room, statement by defendant's confederate that victim was lucky because the defendant wanted to cut his throat was admissible in evidence as part of *res gestae*. Tankered v. State, 456 S.W.2d 134, 6 CLB 520.

§48.00. Circumstantial evidence — fingerprints

Texas Presence of fingerprints of defendant at point of entry, otherwise explainable, are not sufficient circumstantial evidence to convict him of burglary. Dues v. State, 456 S.W.2d 116, 6 CLB 517.

§48.10. — Courtroom identification (See also §25.30.)

Minnesota A defendant convicted of robbery is entitled to a new trial where the victim's identification, the sole issue in the case, was based on inadequate opportunity for observation; the description given at the time of the offense did not coincide with defendant's actual appearance; the lineup procedures were unfair and prejudicial; and the jury was allowed to infer that the defendant had a prior record. State v. Gluff, 172 N.W.2d 63, 6 CLB 163.

Washington Victim's identification of his assailant in court is not rendered impermissibly suggestive simply because defendant is the only black man in the courtroom. State v. Brown, 458 P.2d 165, 6 CLB 52.

§48.40. — Testimony of prior identification (See also §25.00. et seq.)

Court of Appeals, 3rd Cir. It is reversible error to admit on direct examination testimony of eyewitnesses as to pre-trial photographic identifications conducted in the absence of defense counsel after an accused has been taken into custody. United States v. Zeiler, 427 F.2d 1305, 6 CLB 511.

Court of Appeals, 5th Cir. Evidence that government informant dialed phone number registered to defendant and received affirmative response to question whether party answering call was person bearing name by which defendant was known was sufficient to make out *prima facie* case that defendant was a party to the conversation. Palos v. United States, 416 F.2d 438, 6 CLB 86.

New York Evidence of trailing by bloodhounds is admissible in a criminal action provided the proper foundation is first laid. It is not objectionable on the theory that the defendant is deprived of his right to be confronted by witnesses against him, or that the defendant should not be placed in jeopardy by actions of animals, or that the defendant cannot cross-examine the dogs. People v. Centoletta, 305 N.Y.S.2d 279, 6 CLB 160.

New York Testimony by undercover police officer that he had previously identified defendant from photograph, though elicited on cross-examination, was reversible error, since the danger was that the jury may have inferred that defendant had been in trouble with the law before, especially since he did not take witness stand. People v. Richardson, 309 N.Y.S.2d 669, 6 CLB 410.

§50.00. Proof of other crimes to show motive, intent, etc.

Illinois At defendant's trial on charges of armed robbery, rape and deviate sexual assault, prosecutor's comment that the state could "bring in other people—but we are not here to try another case" implied that defendant had committed other similar crimes and was improper, but did not warrant reversal in view of evidence that overwhelmingly proved defendant's guilt. People v. Davis, 252 N.E.2d 743, 6 CLB 220.

§50.10. Out of court experiments

New Mexico Results of polygraph tests, though normally inadmissible in criminal trials due to a lack of scientific acceptance and proven reliability, will be allowed into evidence if the defendant stipulates to their admissibility. State v. Chavez, 461 P.2d 919, 6 CLB 226.

New York In view of the tremendous weight polygraph test results would have in the minds of juries, and in view of the absence of strong general recognition within the scientific community of the accuracy of such results, they are not admissible evidence. People v. Leone, 307 N.Y.S.2d 430, 6 CLB 360.

§50.22. Proof of value

Court of Appeals, 5th Cir. Where at time of theft, value of rings containing diamonds was in excess of $5,000.00, but at time they were found in defendant's possession, rings were merely gold mountings without diamonds and were only

worth several hundred dollars, and there was specific testimony that defendant acquired rings without diamonds, conviction for being in possession of and receiving stolen jewelry having a value of over $5,000 while moving in foreign or interstate commerce could not stand because of lack of federal jurisdictional amount. United States v. Gordon, 421 F.2d 1068, 6 CLB 352.

Arkansas Notwithstanding the fact that evidence established that defendant possessed a stolen 1966 model automobile, his conviction for criminal possession of stolen property in excess of $35 had to be reversed since without vehicle being offered in evidence nor received by the jury, there was no factual basis for a finding that the car's value was $35 or more. Rogers v. State, 453 S.W.2d 393, 6 CLB 415.

§50.25. Stipulations as evidence

California Stipulation entered into by defense counsel and prosecution to submit case on transcript of preliminary examination was, in the circumstances of the case, tantamount to a plea of guilty and, as such, constituted a waiver of petitioner's right to confront and cross-examine witnesses against him and to present witnesses in his own behalf. *In re* Mosley, 464 P.2d 473, 6 CLB 301.

§50.40. Judicial notice

Illinois Trial court in speeding case tried before a jury, committed reversible error in taking judicial notice of the reliability of radar speed measuring device. In so doing, the court could have created impression that radar findings could not be challenged or questioned, thus depriving defendant of fair jury determination on central issue in case. People v. Schmidt, 254 N.E.2d 810, 6 CLB 299.

§51.10. Privileged communications

Kentucky Helping a client return stolen property to the police department is not a transaction within an attorney's professional capacity; if he is called as a witness, the attorney must reveal the identity of that client or face a citation for civil contempt. Hughes v. Meade, 453 S.W.2d 538, 6 CLB 408.

Texas Where a wife turned over to the police the remains of clothing which her husband burned following a robbery, admission into evidence of the clothing was not error since the "husband-wife" privilege concerning testimony of "communications" applies to utterances and not acts. Grundstrom v. State, 456 S.W.2d 42, 6 CLB 525.

§51.18. Witness' assertion of privilege against self-incrimination — effect (See also §36.00.)

New Jersey Witness whose conviction for participation in crime had become final could not refuse to answer questions at trial of alleged co-participant in crime in the absence of disclosure of any criminal exposure justifying invocation of privilege against self-incrimination. State v. Craig, 257 A.2d 737, 6 CLB 107.

§51.25. Informants — disclosure of identity

Indiana Where the State brings out the role of informers in identifying the defendant prior to his arrest, the defense is entitled to know the identity of the informer. The refusal of the trial court to force such disclosure is reversible error. Clover v. Indiana, 251 N.E.2d 814, 6 CLB 100.

§51.30. Immunity

New Jersey Defendant's Fifth Amendment privilege against self-incrimination was not impaired by statutory scheme which authorized a state investigation commission to compel incriminating testimony from the witnesses, and which provided, not absolute immunity against prosecution for the crime testified about, but immunity only from the use of such testimony in any subsequent prosecution of the witness. Zicarelli v. State Commission of Investigation, 261 A.2d 129, 6 CLB 298.

§52.10. Cross-examination — right to witness' prior statements — in general

Indiana Absent a showing by the prosecution of a paramount interest in nondisclosure, pre-trial statements made by a prosecution witness to the grand jury, as well as statements to law enforcement agents of the state are discoverable by the defense at trial for purposes of cross-examination and impeachment of witness' credibility. Antrobus v. State, 254 N.E.2d 873, 6 CLB 307.

§52.20. — Availability of grand jury minutes

Court of Appeals, 2nd Cir. It is a matter of discretion for trial judge to order the transcribing of minutes of a grand jury, and unless already transcribed, they need not be produced on demand of defendant. United States v. Ayers, 426 F.2d 524, 6 CLB 506.

§52.30. — Impeachment by prior conviction

Court of Appeals, 2nd Cir. In a prosecution for willful evasion of military service, where the accused's credibility was the crucial issue, the government's attempts to impeach his credibility by asking the defendant whether he had been convicted of the felony of grand larceny when in fact defendant had never been charged with grand larceny, had only pleaded guilty to misdemeanor of attempted grand larceny in the third degree and had not yet been sentenced was error which was not cured by court's instruction that jury should treat the question as if it had not been asked. United States v. Semensohn, 421 F.2d 1206, 6 CLB 352.

Maryland A prior conviction obtained in violation of *Gideon* v. *Wainright* may not be offered to impeach defendant's credibility. Johnson v. State, 263 A.2d 232, 6 CLB 365.

Colorado Prosecution's use of convictions more than five years old in impeaching defendant's credibility as a witness did not deny defendant equal protection because such convictions are inadmissible in civil actions. Lee v. People, 460 P.2d 796, 6 CLB 164.

§52.35. Nature of conviction

Court of Appeals, 5th Cir. There was no error in permitting government to cross-examine defendant charged with interstate transportation of stolen automobile about existence of prior convictions for identical offense for purpose of impeaching defendant's credibility. Bendelow v. United States, 418 F.2d 42, 6 CLB 291.

§52.60. — Impeachment for prior illegal or immoral acts

Arizona "Cutting class" is not a "prior bad act" for purposes of applying the rule prohibiting cross-examination of specific acts of misconduct not supported by convictions. State v. Albe, 460 P.2d 651, 6 CLB 164.

§52.70. — Impeachment where issue not raised on direct examination

New York Where statements made by defendant were inadmissible on the People's direct case, and the defendant did not "open the door" on his direct examination, it was reversible error for the prosecution on cross-examination to range beyond the defendant's direct examination in order to lay a foundation for the later use of this tainted evidence. People v. Rahming, 311 N.Y.S.2d 292, 6 CLB 465.

§52.85. Impeachment of one's own witness

Court of Appeals, 5th Cir. The refusal to allow defendant to testify in rebuttal of testimony given by his own witness was reversible error where the facts at issue were important to his defense of entrapment and the trial court confused contradiction of a witness with impeachment. United States v. Williamson, 424 F.2d 353, 6 CLB 460.

Michigan Where the defendant's 11 year old sister was called to the stand by the prosecution to testify that a certain hat found at the scene of the crime belonged

to her but on the stand she denied it, and the prosecution thereupon called another witness who testified that she had previously admitted to him that it was her hat, it was reversible error for the prosecution to impeach its own witness by hearsay evidence. People v. Lessard, 177 N.W.2d 208, 6 CLB 469.

§52.90. — Exclusion of prior convictions

Court of Appeals, 1st Cir. The Burgett rule that prior "uncounseled convictions" are inadmissible "to support guilt or enhance punishment" is extended to exclude admission of such prior convictions to impeach credibility of criminal defendant. 6 CLB 591.

§53.10. "Opening the door" through cross-examination

Court of Appeals, 5th Cir. In prosecution for forgery of postal money orders and conspiracy government witness' testimony describing how defendant had beaten, kicked and pistol-whipped her after forcing her to go to his cabin in the woods clad only in a nightgown, was admissible on redirect examination after defense counsel sought on cross-examination to impeach her testimony by showing personal animosity against defendant, based upon her filing a criminal complaint (involving those facts) against him. Hawkins v. United States, 417 F.2d 1271, 6 CLB 287.

§54.08. Defenses — alcoholism and drug addiction

Texas The fact that defendant was an admitted and known narcotics addict did not preclude his conviction for possession of heroin. Rangel v. State, 444 S.W.2d 924, 6 CLB 97.

§54.10. Collateral estoppel

New Jersey Collateral estoppel for successive convictions would be invoked despite the fact that the defense was not raised in a pre-trial motion. State v. Bell, 260 A.2d 849, 6 CLB 295.

New Jersey Once the state charged defendants with receiving stolen goods from another person and accepted their pleas of guilty on that charge, it was estopped from trying them later on a charge of breaking and entering with intent to steal arising from the same incident, where the State's only evidence on the element of intent was the defendants' possession of the items which they had pleaded guilty to receiving from another and where the State's case for breaking and entering to steal depended upon an inference that the defendants were the thieves. State v. Bell, 260 A.2d 849, 6 CLB 295.

§54.20. Double jeopardy — in general

Court of Appeals, 5th Cir. Supreme Court's decision in *Benton* v. *Maryland*, 395 U.S. 784, holding double jeopardy clause of Fifth Amendment applicable to states, is to be applied retroactively to retrials. Galloway v. Beto, 421 F.2d 284, 6 CLB 350.

Michigan Murder defendant's failure to object when trial court, *sua sponte*, discharged jury after third day of trial to permit the state to amend its information, did not constitute waiver of his right against double jeopardy. People v. Brown, 179 N.W.2d 58 (Court of Appeals of Michigan), 6 CLB 603.

New York Where original indictment was invalid because of insufficiency of evidence before grand jury, defendants were not placed in jeopardy at original trial even though evidence was taken, and superseding indictment was not subject to dismissal on ground that it placed defendants twice in jeopardy for the same offense, since jeopardy attaches only if defendant has been placed on trial on valid indictment. People v. Bedjanzaden, 306 N.Y.S.2d 498, 6 CLB 296.

§54.25. — Separate and distinct offenses

New York Where at defendant's first trial for first degree felony murder, no evidence of common law or premeditated murder was introduced and court did not instruct on that offense or any lesser degree there-

of, and there was no opportunity for jury to convict defendant of those crimes, defendant was not placed in jeopardy at that time. Defendant's constitutional protection against double jeopardy was, therefore, not violated where trial court at his second trial, following reversal of his conviction for first degree felony murder, properly charged jury on various degrees of common-law murder, and defendant was convicted of second-degree murder. People v. Robinson, 310 N.Y.S.2d 153, 6 CLB 412.

North Carolina Where defendants were convicted of armed robbery after five trials for the same offense—the first four trials having ended in hung juries—the number of trials, standing alone, did not constitute double jeopardy or exceed due process limitations upon the governmental rights of retrial—the burden of proof being upon defendant to show a gross abuse of discretion by the trial court. State v. Preston, 175 S.E.2d 705 (Court of Appeals of North Carolina), 6 CLB 610.

§54.30. Successive prosecutions — preemption

Maryland Although convictions in federal and state courts arose out of same facts, double jeopardy did not attach for prosecution was not for the "same offense." Melville v. State, 268 A.2d 497 (Court of Special Appeals of Maryland), 6 CLB 610.

§54.40. — Implied acquittal

Court of Appeals, 10th Cir. The Tenth Circuit applies *Benton* v. *Maryland*, 395 U.S. 784 (double jeopardy clause applicable to states), retroactively and reverses conviction of state prisoner who, after her first manslaughter conviction under a first degree murder indictment was reversed on appeal, was retried under a first degree murder indictment and was again convicted of manslaughter. Booker v. Phillips, 418 F.2d 42, 6 CLB 352.

Missouri Supreme Court's decision in *Benton* v. *Maryland*, which held the double jeopardy prohibition of the Fifth Amendment applicable to the states, was not to be applied retroactively to set aside defendant's conviction on retrial of a higher degree offense than his original conviction. Spidle v. State, 446 S.W.2d 793, 6 CLB 159.

§54.60. Double jeopardy — retrial

Court of Appeals, 8th Cir. Where a trial judge on his own initiative set aside guilty verdict in larceny case after realizing that he had failed to notify jury that it must ascertain value of property stolen, the retrial of defendant did not constitute double jeopardy since the first verdict, lacking sufficient force to support a sentence, was the equivalent of a jury disagreement. Houp v. State of Nebraska, 427 F.2d 254, 6 CLB 508.

Pennsylvania Where assistant district attorney procured withdrawal of a juror because complainant's husband felt he had not presented the case well, new trial of the defendant was double jeopardy. Commonwealth v. Richbourg, 266 A.2d 534, 6 CLB 518.

§54.69. Immunity from prosecution

New York Where defendants are granted immunity in return for testimony before the grand jury, they obtain immunity from prosecution for any and all crimes to which their testimony might relate. In the matter of Gold v. Menna, 307 N.Y.S. 2d 33, 6 CLB 360.

§54.81. — Retroactivity of substantive tests

Court of Appeals, 5th Cir. Trial court's failure to instruct jury on insanity defense in a way that comported with new insanity definition adopted by Court of Appeals after the verdict was returned but while the appeal was pending required reversal of conviction and remand for new trial. Davis v. United States, 413 F.2d 1226, 6 CLB 47.

§54.85. — Insanity through drug addiction

Court of Appeals, 2nd Cir. In view of appellant's evidence to the effect that he

was suffering withdrawal symptoms as a result of his heroin habit at the time he entered into unlawful sale of narcotics to a governmental agent, evidence of mental incapacity was properly submitted to the jury on the question of criminal responsibility for the crime itself, but such evidence could not make out the defense of entrapment. United States v. Henry, 417 F.2d 267, 6 CLB 148.

§54.90. — Burden of proof

Connecticut Once the issue of insanity is raised by the defendant, the burden rests upon the state to prove beyond a reasonable doubt that the defendant was legally sane and responsible at the time the offenses committed. State v. Davis, 260 A.2d 587, 6 CLB 299.

§55.00. — Lay testimony

Court of Appeals, 5th Cir. Lay testimony of a defendant's conduct as it relates to the appearance of sanity is allowable, but not if such conduct includes a prior example of defendant's commission of the same crime with which he is now charged. To allow this might result in unfair prejudice and confusion of issues on the question of guilt. Davis v. United States, 413 F.2d 1226, 6 CLB 47.

Connecticut No requirement exists that the state must produce expert testimony to sustain a conviction where defense of insanity is raised. The trier of fact, further, can disregard the opinions of the defendant's experts and adopt the non-expert testimony offered by the state. State v. Davis, 260 A.2d 587, 6 CLB 299.

§55.62. Preemption

Maryland The authority of a state to prosecute defendants for robbery of Selective Service files and for assault and battery on Selective Service employees was not barred by Federal preemption of field. 6 CLB 610.

§55.70. Res judicata

District of Columbia Where a duly authorized administrative agency has determined that defendant did not need a license, the prosecutor in the same jurisdiction would be "estopped" from bringing a criminal action against defendant for failure to obtain a license. District of Columbia v. Fisher, 258 A.2d 456, 6 CLB 166.

§55.80. Self-defense — in general

Court of Appeals, 7th Cir. A prisoner is privileged to use reasonable force in the defense of another prisoner if the defender believes that the other prisoner is being subjected to an unprovoked physical assault by prison guards. United States v. Grimes, 413 F.2d 1376, 6 CLB 48.

New York It was improper for the trial court to charge the jury that defendant had an affirmative duty to retreat even if confronted by an assailant brandishing a knife, and defendant's failure to except to this portion of the charge did not render the error harmless. People v. Rainey, 309 N.Y.S.2d 635, 6 CLB 415.

Pennsylvania Homicide defendant, who was in imminent danger of serious physical injury from an unprovoked attack at his place of business, was under no obligation to retreat from his attacker through nearby exit; and his refusal to do so does not defeat his claim of self-defense. Commonwealth v. Johnston, 263 A.2d 376, 6 CLB 358.

Rhode Island Where a murder defendant testified that after having been assaulted by the deceased, she pushed him to the ground but that she did not believe he was thereby killed, the trial court erred in refusing to instruct the jury as to self-defense. The defendant was, in effect, testifying to separate but consistent defenses of self-defense and of not having inflicted the fatal injuries. State v. Butler, 268 A.2d 433 (Supreme Court of Rhode Island), 6 CLB 603.

Washington Where in trial for second degree murder, defendant's counsel offered to prove that the racial group to which decedent belonged was sufficiently violent to cause one who argued with any mem-

ber of that race to have reasonable ground to apprehend imminent danger of receiving great personal injury from a knife, gun, bar stool or anything else in reach ("a fact that any prudent person encountering a Negro should take into account"), court held that membership in a race is immaterial and not relevant to a determination of the reasonableness of defendant's apprehension of danger just prior to firing his weapon. Court further held that self-defense is personal to the defendant who is concerned only with the person then offering to do him great personal injury. State v. Smith, 470 P.2d 214, 6 CLB 468.

§56.20. Statute of limitations

United States Supreme Court The offense of failing to register for the draft is not a continuing one but is complete upon an individual's initial failure to register upon his 18th birthday or within five days thereafter, as required by law. The statute of limitation being five years, a prosecution of a defendant commenced 8 years after his 18th birthday was therefore untimely. Toussie v. United States, 25 L Ed. 2d 156, 6 CLB 401.

§56.35. Unconstitutionality of statute or ordinance — equal protection

New Mexico A statute making theft of livestock a third-degree felony regardless of the value of the animal stolen does not violate the Equal Protection clause even though all other larcenous crimes correlate severity of sentence with the value of the property stolen. The legislative classification for livestock is a reasonable means to protect an important industry from thefts which are easy to commit and difficult to discover. State v. Pacheco, 463 P.2d 521, 6 CLB 297.

§56.38. — Improper exercise of police power

Washington Mandatory motorcycle helmet statute is reasonably related to the public health, safety and welfare; the greater the number of injuries to motorcyclists, the greater the burdens imposed upon the publicly supplied medical, hospital, ambulance and police services. State v. Laitenen, 459 P.2d 789, 6 CLB 103.

§56.40. — Violation of First Amendment

United States Supreme Court Actor's wearing military uniform in street skit critical of Viet Nam war may not be made the basis of criminal conviction. Statute authorizing only performances which "do not tend to discredit" the military stricken down as violative of First Amendment. Schacht v. United States, ___ U.S. ___, 6 CLB 401.

§56.42. Obscenity

Maryland Dissemination of the idea that a judge can derive sexual gratification from performance of his judicial duties, while farfetched, is well within the protection of the First Amendment. Dillingham v. State, 267 A.2d 777, 6 CLB 521.

§56.45. — Void for vagueness

Court of Appeals, 4th Cir. In a case arising out of the October, 1967 Pentagon anti-war demonstration, the Fourth Circuit sustained convictions for violations of a General Services Administration Regulation [41 C.F.R. 101-19.304]. The court found that the regulation barring "unwarranted loitering . . . or assembly . . . or any other unseemly or disorderly conduct on property" was neither unconstitutionally vague nor overbroad. United States v. Cassiagnol, 420 F.2d 868, 6 CLB 354.

§57.00. "Allen" dynamite charge

Nebraska Instructing jury after it had deliberated for over 15 hours and reported that it was hopelessly deadlocked at 11 to 1, that case should be disposed of by verdict; that it was judge's earnest hope and belief that such could be accomplished; that in view of vote, judge could not be convinced that there was no possibility of agreement among the jurors; and that he was asking jury to earnestly renew its efforts to come to a verdict, constituted coercion and an invasion of province of jury and deprived defendant of a fair and impartial trial. State v. Garza, 176 N.W.2d 664, 6 CLB 415.

§57.10. Burden of proof

Illinois Trial court's instruction that positive identification by one witness who had favorable opportunity to observe defendant is sufficient to support conviction for armed robbery constituted reversible error even where defense counsel failed to object to instruction. People v. Wicks, 252 N.E.2d 698, 6 CLB 220.

§57.45. Defendant's failure to testify

Arizona Where defendant was tried in absentia because of his voluntary absence from the state, the trial court's refusal to instruct that when a defendant fails to testify, the jury is not to draw any inference either as to guilt or innocence from that fact, was not prejudicial error. State v. Hunt, 471 P.2d 303, 6 CLB 520.

§57.70. Lesser included offenses

California Where it is supported by the evidence, trial court's failure to give an instruction on lesser included offenses on its own motion is error. People v. Hood, 462 P.2d 370, 6 CLB 220.

§57.75. Limiting and cautionary instructions

California Failure of court on its own to give instructions that extra-judicial statement of one alleged co-conspirator is not to be considered against another alleged co-conspirator unless the jury first determined that a conspiracy existed between them at the time of the declarations was not error where there was strong evidence of existence of a conspiracy. People v. Brawley, 461 P.2d 361, 6 CLB 217.

§58.00. — Recent and exclusive possession

Court of Appeals, 2nd Cir. Where securities stolen five months earlier in New York were found in the possession of defendants in Connecticut who were supplying them for a price to a businessman for use as collateral for bank loans, it was not error for the trial court to charge the jury that if it found the theft to be a sufficiently recent occurrence, it could infer from the fact of the defendants' possession that they had transported the stolen securities into the state. United States v. Coppola, 424 F.2d 991, 6 CLB 456.

Arizona Trial court did not unconstitutionally comment upon defendant's failure to testify at his auto theft trial when it instructed jury that unexplained possession of a recently stolen car can create an inference of guilt. State v. Ruiz, 463 P.2d 100, 6 CLB 231.

§58.60. — Conspiracy

Court of Appeals, 2nd Cir. Where jury was charged that defendant might be found guilty of conspiracy to rob a bank if the jury found that defendant knew there was a conspiracy "to do something wrong," judge's instruction was fatally defective. United States v. Gallishaw, 428 F.2d 760 (2nd Cir.), 6 CLB 593.

§60.05. — Selection of veniremen

Indiana In the absence of bad faith on the part of jury commissioners in selecting a jury list which does not contain the names of any women, an indictment may not be quashed, nor a conviction reversed, because of the absence of women on the jury list. Brewer v. Indiana, 252 N.E.2d 429, 6 CLB 165.

§60.06. — Investigation of prospective jurors

Court of Appeals, 2nd Cir. Government's extensive investigation into the background of prospective jurors with a view toward challenging those jurors who might be prejudiced against the government does not prejudice the defendant nor discourage citizens from serving as jurors. United States v. Falange, 426 F.2d 930, 6 CLB 513.

§60.10. Conduct of voir dire — in general

Court of Appeals, 4th Cir. Trial judge's refusal to ask on *voir dire* whether juror would hire person for position of trust if person had prior criminal record was reasonable where two other questions were asked which did probe possible effect of defendant's prior convictions on juror's

impartiality. United States v. Windsor, 417 F.2d 1131, 6 CLB 288.

§60.70. Exposure of jurors to prejudicial publicity

New York Failure of trial court to take any steps whatsoever to assure that jurors were not exposed to or adversely influenced by prejudicial matter appearing on court calendar required new trial where it was informed by defense counsel that he had observed jury members peruse court calendar and remark that party charged with narcotic offenses similar to those at issue in instant case was defendant. People v. Rivera, 258 N.E.2d 699, 6 CLB 414.

§60.75. Experience in other criminal cases as affecting jurors' impartiality

Pennsylvania Where twenty-two of fifty-two members of jury panel summoned for trial of defendant had sat on jury panel which participated in *voir dire* examination preceding trial of defendant on an unrelated offense; where it was possible that jury had learned of defendant's conviction at such prior trial; and where defendant was unable to prevent prejudice by use of peremptory challenges without questioning of jury panel which would reveal prior trial and conviction, failure of court to grant continuance until next court term, when different panel would sit, resulted in substantial prejudice requiring vacatur of sentence and remand for new trial. Commonwealth v. Free, 259 A.2d 195, 6 CLB 220.

§61.12. Deliberation — lengthy continuous deliberation as coercion

Iowa Where murder case had been tried for 9 days and one could have anticipated that the jurors might not reach a verdict at a reasonable hour after the case was submitted to them at 4:30 P.M., the court had a duty to provide for lodging for jurors for the night, and judge's instructing the jurors at 2:00 A.M. when they reported they were hopelessly deadlocked, that they must remain out until they reached a verdict denied the defendant a fair determination of the issues, with the result that the verdict returned 2½ hours later could not stand. State v. Albers, 174 N.W.2d 649, 6 CLB 365.

Court of Appeals, 8th Cir. Where only issue in Dyer Act case was the defendant's knowledge that automobile was stolen, shortness of jury's deliberation (it lasted only 5 to 7 minutes) did not deprive defendant of a fair trial. There is no rule of law which requires a jury to deliberate for any particular time. United States v. Brotherton, 427 F.2d 1286, 6 CLB 513.

§61.20. — Extra-judicial communications

Court of Appeals, 4th Cir. Where private communication to a juror is beneficial to the defendant and where the trial court issues proper limiting instructions, defendant's conviction will not be disturbed. Ladd v. State of South Carolina, 415 F.2d 870, 6 CLB 89.

§61.21. — Right to have exhibits

Illinois Where court's instructions repeatedly refer jury to indictment so as to identify charge against defendant and to explain obligation upon jury to apply certain rules governing jury's consideration of evidence relating to the charge, court's failure to supply jurors with copy of indictment is erroneous. Since instructions to jury also failed to define elements of crime charged, conviction was reversed. People v. Lewis, 250 N.E.2d 812, 6 CLB 54.

§61.22. — Other unauthorized or improper conduct

New York Unauthorized visits by three jurors to scene of crime warranted reversal of conviction for first degree manslaughter without showing of actual prejudice since jurors became unsworn witnesses against the defendant, who was unaware of the visits and who was given no way of testing jurors' observations and no opportunity to diminish or eliminate false impressions. People v. Crimmins, 307 N.Y.S.2d 81, 6 CLB 365.

§61.25. — Supplemental instructions (See also §58.60.)

Court of Appeals, D.C. Cir. Where foreman, in course of jury's deliberations, asked "How was identification of defendant made before arrest?," court's response that "you must decide this case on the basis of the evidence as you recall it and no additional information not in the record can be given to you," which was made with the consent of both prosecution and defense counsel, did not constitute reversible error, despite accused's contention on appeal that court, even though not so requested, should have informed the jury that it could infer from absence of any evidence that such evidence would have been adverse to the government. United States v. Williams, 421 F.2d 1166, 6 CLB 354.

Court of Appeals, 2nd Cir. Correct practice where jury, after retiring, submitted notes containing questions would have been for trial judge to answer notes in open court in presence of defendant and his attorney. United States v. Schor, 418 F.2d 26, 6 CLB 288.

Court of Appeals, 2nd Cir. Where meaning of second note from jury was ambiguous and reading in open court might have brought clarification, and where note could not be answered intelligently in its present form, failure of judge to answer note in open court was reversible error. United States v. Schor, 418 F.2d 26, 6 CLB 288.

Court of Appeals, 2nd Cir. Though Rule 43, F.R.Cr.P. protecting defendant's right of presence should not require defendant's presence when transcript is sent to retired jury any more than when exhibit is sent to them, it would generally be preferable to have judge read testimony requested by jury in open court and in presence of defendant, and to consult with counsel for both sides to see if there is disagreement as to what should be submitted to the jury. United States v. Schor, 418 F.2d 26, 6 CLB 288.

Maryland In response to the jury's question in course of deliberations as to whether defendant would be freed or institutionalized if found insane, the trial court's answer that if found not guilty by reason of insanity disposition would be made in accordance with the law of the state did not improperly influence the jury's determination of the issue and did not constitute reversible error. Brown v. State, 260 A.2d 665, 6 CLB 299.

§62.01. Special verdicts

Court of Appeals, 1st Cir. The submission to a jury of specia questions in addition to the general issue of guilt or innocence is prejudicial error especially where a prosecution involves a question of whether the defendants had exceeded the grounds of free speech – an issue on which the jury peculiarly has the discretion to apply community standards or conscience. United States v. Spock, 416 F.2d 165, 6 CLB 85.

§62.02. — Requirement of unanimity

Oregon Defendant's Fourteenth Amendment rights were not violated by a verdict of guilty returned by ten of twelve jurors as authorized under the State constitution. State v. Gann, 463 P.2d 570, 6 CLB 296.

§62.04. — Inconsistent verdicts

Arizona Acquittal on charges of attempted rape and aggravated assault and convictions for committing lewd acts and kidnapping with intent to rape, even of irreconcilable, do not require reversal of convictions; there is no necessity for consistency between verdicts on several counts of an indictment. State v. Zakhar, 459 P.2d 83, 6 CLB 54.

Arizona Conviction for aiding and abetting a rape was not invalidated by the fact that the alleged principal was later acquitted of the rape in a separate trial. State v. Spillman, 468 P.2d 376, 6 CLB 414.

Michigan Where the jury was charged that it could bring in five possible verdicts, one of which was "guilty of assault with intent to commit rape" and another of

which was "assault and battery," and the jury brought in a verdict of "assault with intent," then, in the absence of a more definitive statement by the jury, it must be assumed that the jury found defendant guilty of the lesser crime (that of simple assault); and the trial court erred in sentencing him for the greater crime. People v. Smith, 177 N.W.2d 164, 6 CLB 467.

New York Where indictment charged defendant with shooting decedent "with malice aforethought" and there was evidence submitted at trial that he shot decedent in the back as decedent ran away from defendant, jury could find either that defendant "intended" to kill his victim, or that the killing occurring during the course of robbery; and the fact that the prosecutor at the second trial concentrated on establishing felony murder did not rule out possibility that he might also have proved intent to kill during the course of defendant's commission of a felony. People v. Robinson, 310 N.Y.S.2d 153, 6 CLB 412.

§63.30. — Impeachment of verdict

Texas Affidavits of six jurors that they believed the defendant insane both at the time of trial and at the time of the commission of the murder for which he was convicted but had found him to be sane only because they accepted the prosecutor's unsworn statement at the trial that if found insane, the defendant could not have been held in hospital for more than 90 days was not ground for granting a new trial in light of fact that (1) the trial judge had instructed the jury to disregard the prosecutor's erroneous remarks as not being the law and (2) a juror is not permitted to impeach or explain his verdict by showing the reason for the conclusion reached. Forder v. State, 456 S.W.2d 378, 6 CLB 520.

§65.30. — Right to examine pre-sentence report

Court of Appeals, 8th Cir. Where the facts contained in pre-sentence report which were relied upon by sentencing judge were fully disclosed to defendant and he had an opportunity to explain and correct them, sentencing judge's refusal to permit defense to see pre-sentence report did not constitute abuse of discretion — even though defendant claimed report contained false and misleading statements. Need for leaving disclosure within discretion of court is founded on possibility that full disclosure in many instances could violate confidential sources. United States v. Garden, 428 F.2d 1116 (8th Cir.), 6 CLB 601.

New Jersey The denial of defendant's motion for disclosure of pre-sentence report resulted in no prejudice where disputed statements in the report could not have moved trial court to impose lesser sentence and report of prior criminal record was substantially undisputed. State v. Marvel, 259 A.2d 697, 6 CLB 231.

New Jersey Defendant is entitled to disclosure and examination of the pre-sentence report and must be given an opportunity to be heard on those items in the report which a court would consider in determining the sentence it will impose. This is a matter, not a constitutional compulsion, but of "rudimentary fairness." State v. Kunz, 259 A.2d 895, 6 CLB 304.

§65.65. Standards for imposing sentence

California Although a jury may properly consider the defendant's remorse or lack thereof in fixing a penalty, the California Supreme Court considered it fundamentally unfair for the state to urge that a defendant's failure to confess his guilt after he had been found guilty demonstrated his lack of remorse and that this failure to confess should be considered as a ground for imposing the death penalty. Such a requirement would in effect cause the defendant to forfeit his right to urge the trial court on motion for new trial to reweigh the evidence on the issue of his guilt. People v. Coleman, 459 P.2d 248, 6 CLB 52.

Idaho Trial court, in passing upon matter of probation for the defendant who

pleaded guilty to burglary charge, did not err in considering previous charge of burglary even though charge had been dismissed after the defendant had served period of probation. State v. Ballard, 461 P.2d 250, 6 CLB 171.

§65.68. Nature of sentence hearing before jury

California The principle of *Bruton* v. *United States*, 391 U.S. 123 (1968), that the introduction into evidence of a co-defendant's extrajudicial statement that inculpates the defendant violates the defendant's Sixth Amendment right of confrontation even if the jury is instructed to disregard the statement as evidence against the defendant applies to the penalty as well as the guilt stage of a criminal proceeding and to statements sought to be introduced by the co-defendant as well as by the prosecution, so long as the defendant makes timely objection to its introduction. People v. Floyd, 464 P.2d 64, 6 CLB 357.

§65.70. Duty to advise defendant of his right to appeal

Court of Appeals, 2nd Cir. The state is under an obligation to inform any indigent convicted of crime that he has a right to appeal his conviction without cost to himself, and with the aid of counsel appointed by the state. United States *ex rel.* Smith v. McMann, 417 F.2d 648, 6 CLB 212.

§66.00. Double jeopardy — jail time credit

Arizona While amount of time served in jail prior to conviction should be taken into consideration into fixing sentence, denial of defendant's motion for credit for time served in jail prior to sentencing did not place him in double jeopardy and violate equal protection clause of Fourteenth Amendment under doctrine of North Carolina v. Pearce, 395 U.S. 711. State v. Kennedy, 472 P.2d 59 (Supreme Court of Arizona), 6 CLB 603.

§66.10. Punishment of status (See also §54.08.)

Court of Appeals, 9th Cir. An alleged chronic alcoholic, convicted of public drunkenness was not punished for being a chronic alcoholic nor for drinking but for the performance of an act forbidden to one while in a state of extreme intoxication, that of appearing in a public place. Budd v. Madigan, 418 F.2d 1032, 6 CLB 287.

Illinois Conviction and punishment of homosexual for crime of deviant sexual assault does not constitute cruel and unusual punishment. People v. Jones, 251 N.E.2d 195, 6 CLB 51.

§66.15. — Particular penalties as constituting cruel and unusual punishment

Court of Appeals, 3rd Cir. Five consecutive ten to twenty year sentences for five separate crimes of burglary did not amount to cruel and unusual punishment. United States *ex rel.* Darrah v. Brierly, 415 F.2d 9, 6 CLB 95.

§66.30. Excessive sentences

Florida It was legitimate, although highly unusual, for trial judge to place the defendant on twenty years probation during which time the defendant was to serve 60 days in jail each year, and to pay a $3,000 fine over a period of three years. State v. Williams, 237 So.2d 69, 6 CLB 461.

§66.40. Favorable sentencing treatment for co-defendant

Illinois Although disparity of sentences between co-defendants does not, of itself, warrant use of power to reduce punishment imposed by a trial court, 10-20 year sentence to one defendant who went to trial was excessive and would be reduced to 6 to 12 years where co-defendant with a similar prior criminal record received 6 to 12 years after his guilty plea. People v. Jones, 254 N.E.2d 843, 6 CLB 305.

§66.50. Increasing sentence upon retrial

D.C. N.C. Harsher sentence imposed after trial *de novo* in Superior Court was improper where the state failed to show that the sentence was based on subsequent events presented to the Superior Court. Torrance v. Henry, 304 F.Supp. 725, 6 CLB 151.

Illinois Where defendant absented himself from retrial on burglary charge without suggestion of appropriate reason or justification, and was apprehended a year later and defendant had previous record of felony convictions, imposing sentence of 15 to 20 years after conviction was proper even though sentence imposed after two previous (reversed) trials on same charges resulted in sentence of 10 to 20 years. People v. Cox, 255 N.E.2d 208, 6 CLB 370.

Michigan Where defendant pleaded guilty to assault with intent to commit murder, and on appeal his case was remanded and defendant was then tried before a different judge, it was not reversible error for new judge to impose a more severe sentence. People v. Payne, 170 N.W.2d 523, 6 CLB 59.

Missouri Second sentence imposed on retrial need not be limited to that imposed at first trial where second sentence was imposed by jury without knowledge of prior trial. Spidle v. State, 446 S.W.2d 793, 6 CLB 159.

New York Where penalty has been increased upon resentence, the record must affirmatively contain reasons and factual data concerning identifiable conduct of the defendant occurring after time of original sentence which could be said to justify the increase. People v. Winslow, 312 N.Y.S.2d 495, 6 CLB 525.

§66.60. Multiple punishment — in general

Court of Appeals, 4th Cir. Defendants were not subjected to double jeopardy by conviction and consecutive sentences for conspiracy and four related substantive offenses with implied accusation of collusion between defendants as aiders and abettors, although evidence identical to that adduced to establish conspiracy was used to convict defendants on substantive counts. United States v. McGowan, 423 F.2d 413, 6 CLB 404.

Minnesota Conduct of defendant who drove through four municipalities at high and excessive speeds in continuous effort to evade pursuing police was one continuous, indivisible course of action constituting reckless driving, and his conviction and punishment in one municipality barred subsequent prosecution in another. State v. Boucher, 176 N.W.2d 624, 6 CLB 416.

Minnesota If a person's conduct constitutes more than one offense, he may be punished for only one such offense, and conviction or acquittal of any of them is a bar to prosecution for any other. State v. Boucher, 176 N.W.2d 624, 6 CLB 416.

§66.90. — Merger doctrine

Illinois Conduct of defendant in hitting person from rear, knocking him to ground, cutting him with knife, taking his watch, demanding his money, and then proceeding to kick him about head and shoulders until police arrived was not single transaction but two separate acts or series of acts, and two convictions, one for armed robbery and one for aggravated battery, with concurrent sentences were proper. People v. Baker, 252 N.E.2d 693, 6 CLB 231.

Tennessee Defendant found guilty of stealing a television set could not be convicted of both first degree burglary and grand larceny since the burglary conviction necessarily included the grand larceny. Carter v. State, 447 S.W.2d 115, 6 CLB 224.

§70.15. Multiple offender sentences — right to attack prior conviction

New York Defendant who was sentenced as fourth-felony offender is entitled to an evidentiary hearing on a motion to vacate the judgment, where defendant claims

that he was not represented by counsel at one of his prior convictions, and the documentary evidence on that issue is inconclusive. People v. Randolph, 303 N.Y.S.2d 517, 6 CLB 55.

§70.55. Probation — maximum term

Kentucky A proceeding revoking probation does not involve a complete reopening of the case against the defendant. The order revoking probation may not, therefore, impose a greater punishment than that which was fixed in the original judgment of conviction. Hord v. Commonwealth, 450 S.W.2d 530, 6 CLB 370.

§71.35. Waiver of right to appeal

Pennsylvania Where accused was originally sentenced to life imprisonment and decided not to appeal on the erroneous view that the state could seek the death penalty on retrial, accused would be granted appeal as though timely filed. A decision not to appeal, based on a fear of what the state could not constitutionally do, "cannot, as a matter of law, be a knowing and voluntary waiver of the right to appeal." Commonwealth v. Magee, 253 A.2d 627, 6 CLB 152.

§71.60. Right to brief and argue appeal

New York Implicit in and fundamental to right of defendant to appeal and to have counsel on such appeal is right that counsel be given an opportunity to be heard and to submit a brief on merits. Judgment of appellate court affirming conviction therefore had to be reversed where appellate court refused to allow defense counsel an opportunity to prepare and submit a brief. Fact that appellate court had before it the record, including minutes of a hearing on remittitur to determine one of the issues raised on appeal, or that the appeal may have lacked merit did not warrant a different result. People v. Emmett, 306 N.Y.S.2d 433, 6 CLB 301.

§71.90. Jurisdiction — failure to file timely notice of appeal

California Where accused wanted to appeal but was undecided due to concern that he would be serving "dead time," and his concern was based on an erroneous view of the law and his attorney did not correct accused's misapprehension, accused would be granted permission to file a late appeal. People v. Bailey, 460 P.2d 974, 6 CLB 152.

§72.00. — Mootness

United States Supreme Court Defendant, by becoming a fugitive from justice during pendency of appeal from conviction, thereby disentitles himself from consideration of his appeal on the merits. Molinaro v. New Jersey, 24 L Ed.2d 586, 6 CLB 392.

Alaska Where a child had been declared a wayward minor in violation of constitutional procedures, but had already served his sentence, his appeal was not mooted since "it is a fact of life" that such records get into the hands of private and public employers. G.J. v. State, Alaska 471 P.2d 367, 6 CLB 516.

§72.10. — Non-final orders

Maryland Defendant had the right to an immediate appeal from denial of his motion to dismiss indictment for lack of a speedy trial had been violated, and trial which was held after denial of motion and after defendant had made known his desire to appeal was nullity. Westmoreland v. State, 261 A.2d 35, 6 CLB 294.

§73.10. — Failure to object or file bill of exceptions as precluding appellate reviews

Court of Appeals, 9th Cir. Where entrapment defense was withdrawn at trial, defendant cannot object, on appeal, to trial court ruling permitting prosecution to introduce evidence of defendant's predisposition in response to contemplated defense of entrapment. Jordan v. United States, 428 F.2d 7, 6 CLB 508.

Court of Appeals, 10th Cir. Failure of defense counsel to make timely objection to prosecutor's prejudicial comments concerning failure of defendants to take the stand did not waive the objection. Doty v. United States, 416 F.2d 887, 6 CLB 94.

Illinois Defendant's failure to include in record details of mitigation and aggravation of sentence hearing did not preclude appellate court from considering defendant's contention that his sentence was excessive. People v. Jones, 254 N.E.2d 843, 6 CLB 305.

Missouri Defendant, convicted, after trial, of abortion, may not claim on appeal that the statutory provision allowing only abortions "necessary to preserve" the mother's life is unconstitutionally vague, where his defense at trial was not based on that exception but consisted of a claim that someone else had terminated the pregnancy. State v. Mucie, 448 S.W.2d 879, 6 CLB 293.

Oregon Counsel's falure to object at probation revocation hearing to use of confession elicited by probation officer is a bar to raising the issue on appeal. State v. Skinner, 461 P.2d 62, 6 CLB 151.

§73.20. — Serious error recognized in the absence of objection below

Michigan Prosecutor's use of defendant's statements taken during in-custody interrogation, without showing that warnings required by *Miranda* decision had been given prior to interrogation, was reversible error though the defendant failed to object to the use of such statements to impeach him. People v. Wilson, 174 N.W.2d 79, 6 CLB 293.

§73.40. Harmless error test for constitutional errors

Court of Appeals, 1st Cir. The Burgett rule applies retroactively but is subject to the "harmless error beyond a reasonable doubt" test. 6 CLB 591.

Court of Appeals, 1st Cir. It was harmless error to admit evidence of three prior "uncounseled convictions" where defendant was positively identified by several eyewitnesses and where his credibility was legitimately impeached by introduction into evidence of two valid prior convictions. Gilday v. Scafati, 428 F.2d 1027 (1st Cir.), 6 CLB 591.

§74.10. Motion for new trial — newly discovered evidence

Oregon Where physician, who was state's first witness in rape case, testified that he had found live sperm in victim's vagina, defendant's evidence, offered after jury returned guilty verdict, that he had undergone vasectomy some years before, and medical examination subsequent to trial that disclosed that defendant was incapable of producing live sperm, were not "newly discovered evidence," and motion for new trial was properly denied. State v. Rutledge, 468 P.2d 913, 6 CLB 416.

§74.70. — Grounds

Kansas Where defendant had been represented by retained counsel at his homicide trial in 1949, but took no direct appeal from his conviction, the unavailability of the trial transcript for use on post-conviction proceedings would not be grounds for vacating the conviction. Miller v. State, 460 P.2d 501, 6 CLB 152.

New York Where defendant was adequately represented by counsel and, despite numerous opportunities to do so, failed to inform the court of his inability to understand English, he could not complain in a *coram nobis* proceeding that he was deprived of a fair trial because of his inability to understand the proceedings. People v. Ramos, 309 N.Y.S.2d 906, 6 CLB 412.

§74.80. — Right to an evidentiary hearing

New York In *coram nobis* proceeding, petitioner's claim that his retained counsel had agreed to file notice of appeal but had failed to do so presented a question of fact sufficient to require a hearing. Retained counsel's affidavit categorically denying defendant's claim should not have been accorded conclusive effect. People v. Lewis, 309 N.Y.S.2d 710, 6 CLB 416.

New York Court is required to hold hearing on application for writ of error *coram nobis* where petitioner alleges that he failed to appeal because retained counsel

failed to apprise him of his right to appeal. People v. Martindale, 305 N.Y.S.2d 434, 6 CLB 226.

§75.10. — Failure to raise claim at trial or on direct appeal as bar

Oregon Where petitioner had competent attorney who was not guilty of fraud and all circumstances were such that the attorney would reasonably have been expected to object to constitutionally defective evidence, there was nothing unfair in asserting, in post-conviction proceedings, procedural rule requiring objection to such evidence at petitioner's trial. North v. Cupp, 461 P.2d 271, 6 CLB 154.

§75.45. — Exhaustion of state remedies

Court of Appeals, 7th Cir. Federal district court would have jurisdiction over juvenile's petition for *habeas corpus* where she failed to take direct appeal and subsequently sought state collateral review but was unable to obtain review because of inability of state courts to find authority for assigning counsel. Reed v. Duter, 416 F.2d 744, 6 CLB 91.

Court of Appeals, 8th Cir. Doctrine of exhaustion of state remedies is only a rule of comity and need not be mechanically applied where the state court, for procedural reasons, has once refused to pass upon merits of issue. Losieau v. Sigler, 421 F.2d 825, 6 CLB 352.

§75.48. — Waiver or deliberate bypass

Court of Appeals, 3rd Cir. There was no need for a federal *habeas corpus* hearing on the issue of waiver of a search and seizure claim, where it appeared that the waiver was consistent with the attorney's belief that the search and seizure claim would fail and with the defense that defendant had loaned his automobile to a friend and knew nothing of the contraband found therein. United States *ex rel.* La Molinare v. Duggan, 415 F.2d 730, 6 CLB 94.

Court of Appeals, 5th Cir. Failure to contest voluntariness of a confession in state court will not be considered a "deliberate bypass of state procedures" and will not preclude federal *habeas corpus* relief where the state procedure available for determining voluntariness was unconstitutional under the holding of *Jackson* v. *Denno,* 378 U.S. 368 (1964). Moreno v. Beto, 415 F.2d 154, 6 CLB 86.

Court of Appeals, 8th Cir. Where state court had held that prisoner had procedurally waived his right to raise search and seizure issue by failing to appeal it directly, federal *habeas* court was not required to apply doctrine of exhaustion, and could consider issues of whether prisoner had consented to search and whether he had knowingly bypassed right to object to search during state proceedings, and it was not necessary for federal court to grant state court opportunity to pass upon issues of consent and bypass. Losieau v. Sigler, 421 F.2d 825, 6 CLB 352.

§76.10. Revocation of probation — grounds

Texas Where a condition of defendant's probation was that he "avoid injurious or vicious habits," it was an abuse of discretion to revoke his probation upon that ground when the sole evidence was his admission that he had taken one barbiturate capsule. Campbell v. State, 456 S.W. 2d 928, 6 CLB 523.

§76.15. — Burden of proof

Court of Appeals, 3rd Cir. In revocation of probation hearing, judge need only be "reasonably satisfied" of violation of terms of probation and sole question on review is abuse of discretion in revoking probation. Necessary degree of proof is less than that required to sustain a criminal conviction. United States v. D'Amato, 429 F.2d 1284 (3rd Cir.), 6 CLB 596.

§76.85. — Due process requirements

Court of Appeals, 10th Cir. Although parole is a matter of grace, revocation of parole cannot be accomplished by means inconsistent with due process; notice and hearing are therefore required. 6 CLB 594.

Court of Appeals, 10th Cir. Determination that Oklahoma summary revocation procedures were unconstitutional was not retroactive in nature and therefore not applicable to petitioner. Murray v. Page, 429 F.2d 1359 (10th Cir.), 6 CLB 594.

Court of Appeals, 10th Cir. Specific constitutional safeguards of representation by counsel, right to present witnesses, confrontation, cross-examination and compulsory process are not required at state parole revocation hearings despite extension of safeguards to probation revocation proceedings involving deferred sentences. 6 CLB 595.

§80.00. Assault

Arizona Alleged assault by attorney upon adversary's client which was an isolated incident not involving fixed pattern of misbehavior did not warrant a solemn reprimand. In re Johnson, 471 P.2d 269, 6 CLB 516.

New York Testimony of officer that he was knocked down permitted inference of "substantial pain" sufficient to establish "physical injury" in second degree assault case. People v. McDowell, 312 N.Y.S.2d 477, 6 CLB 519.

Wisconsin Knowledge that police officer is acting in his official capacity is not an element of the crime of assault on a police officer. State v. Caruso, 172 N.W.2d 195, 6 CLB 153.

§80.22. Burglary

Arizona Evidence that the defendant who unlawfully entered a house through an unlocked door, was observed in the house with hand resting on the television set, refused to answer call at the door, fled, and when apprehended, lied about his presence in the house was insufficient to prove intent to commit theft and would not sustain a conviction of burglary. State v. Rood, 462 P.2d 399, 6 CLB 213.

Ohio An "inhabited dwelling house" within the meaning of the Ohio burglary statute, includes summer homes and second homes. State v. Lisiewski, 252 N.E.2d 168, 6 CLB 96.

§80.23. Conspiracy

Court of Appeals, 1st Cir. When the alleged agreement of a conspiracy encompasses both legal and illegal activity which is political within the shadow of the First Amendment, the prosecution must prove a defendant's specific intent to adhere to the illegal portion of the agreement. United States v. Spock, 416 F.2d 165, 6 CLB 85.

Michigan The fact that one of two co-defendants who were charged with conspiracy to violate gambling laws knew where the other co-defendant kept betting slips and paraphernalia was not sufficient to prove the *corpus delecti* of the alleged conspiracy, there being no other evidence tending to show that the two co-defendants associated in a common enterprise. People v. Blakes, 170 N.W.2d 832, 6 CLB 50.

New York I. Even if illegal agreement to bribe was shown, conspiracy conviction could not stand where there was no proof that third person delivered any money or that defendant attempted any bribes before the unlawful agreement had been abandoned.

II. Where third person had withdrawn from agreement with defendants to bribe officials, and plan was "revived" to assist investigation of defendants, third person could not have requisite criminal intent to enter conspiracy to bribe because he no longer relied upon defendant's representations. People v. Bauer, 305 N.Y.S.2d 42, 6 CLB 156.

§80.25. Dangerous and deadly weapons

Alaska Heavy boots, while not dangerous weapons *per se* as guns, are, if used as instruments of offensive combat, deemed "dangerous weapons" for purposes of applying an aggravated assault statute. Berfield v. State, 458 P.2d 1008, 6 CLB 57.

Illinois Defendant, a cab driver, was properly convicted of unlawful use of a gun, which was found in his cab when he was driving it; a statutory exception allowing possession of a gun in a "fixed

place of business" was held not to apply to the cab. People v. Cosby, 255 N.E.2d 54, 6 CLB 306.

Indiana A glass jar was held to be a "bludgeon" for purposes of imposing additional punishment under an armed robbery statute. Patton v. State, 251 N.E.2d 559, 6 CLB 97.

Iowa Parking lot of a drive-in restaurant is not a "public highway" within the meaning of a statute prohibiting the possession of guns in a vehicle on a public highway. State v. Sims, 173 N.W.2d 127, 6 CLB 234.

Ohio Defendant was properly convicted under a statute making it a crime to "carry . . . a weapon concealed on or about the person," where a sheathed knife was found under the seat of car which defendant was driving when arrested. State v. Pettit, 252 N.E.2d 325, 6 CLB 173.

§80.26. Disorderly conduct

Connecticut A private university, although financially supported by tax money, is not a public place. It is therefore not a breach of the constitutional rights of free speech and peaceful assembly in public places for police, acting at the request of school officials, to bar admission of student demonstrators to a campus building. Defendants were held guilty of breach of peace in seeking to force their way through police lines. State v. Greenwald, 265 A.2d 720, 6 CLB 461.

District of Columbia Statute making it a crime to "bring into public disrepute" any officer of a foreign government within 500 feet of a building used or occupied by foreign government personnel is not unconstitutional either on its face or as applied; defendant was properly convicted for shouting, to people near a house where the Shah of Iran was staying, that the Shah was purchasing "arms to suppress the people of Iran." Zaimi v. United States, 261 A.2d 233, 6 CLB 298.

Georgia Where the defendant stood at the rear of an unlighted room silhouetted against the light of a second room, dropping his bathrobe and fondling his private parts on three different occasions within view, through a window, of children waiting for school bus on street outside, such exhibition was "public" within meaning of public indecency statute, and the question of intent was a matter for the jury. Byous v. State, 175 S.E.2d 101, 6 CLB 468.

Kansas Loud and indecent references to motherhood, the flag, the U.S. Marine Corps and the President constituted a breach of the peace in that it disturbed the feeling of security and tranquility of those who moved away after hearing the statements. State v. Cleveland, 469 P.2d 251, 6 CLB 411.

New York Statute making it a crime for a person to loiter, remain or wander in or about a place without apparent reason, and under circumstances which justify suspicion that he may be engaged in or about to engage in a crime, and without being able to give a reasonably credible account of his conduct and purpose is unconstitutional. Statute is vague and dispenses with requirement of probable cause. People v. Beltrand, 314 N.Y.S.2d 276 (Criminal Court of the City of New York), 6 CLB 605.

Ohio Where there was no evidence presented that such dress was contrary to the community standards, a woman walking in normal manner on the streets of Cincinnati dressed from the waist up in nothing but a hat, gloves and a pair of "pasties" over the nipples of her "expansive mammary glands" was not guilty of indecent act. City of Cincinnati v. Wayne, 261 N.E.2d 131 (Court of Appeals of Ohio, Hamilton County), 6 CLB 609.

§80.28. Endangering morals of minor

Michigan Evidence that defendant invited girl into his car and offered to "do it" to her and "get" her after church was sufficient to convict him of violating Detroit ordinance prohibiting "ogling," "annoying," or "molesting by gesture." People v. Wilson, 173 N.Y.2d 252, 6 CLB 234.

Michigan Defendant, who kissed a ten-year-old girl on the lips several times and inserted his tongue in her mouth, was improperly convicted of "taking indecent and improper liberties," since there was no showing that he was motivated by a desire to gratify himself sexually. People v. Brandt, 171 N.W.2d 59, 6 CLB 58.

§80.29. Family offenses

Ohio Defendant, who stayed home from work for three days drinking wine and who cursed his wife in the presence of his children, was properly convicted of violating an ordinance making it a crime for any person to "abuse his family." City of Cincinnati v. McIntosh, 251 N.E.2d 624, 6 CLB 97.

§80.35. Flag desecration

District of Columbia Defendant who wore a shirt resembling an American flag was properly convicted under a statute which proscribes "knowingly cast[ing] contempt upon the flag of the United States by publicly mutilating, defacing and defiling said flag." Hoffman v. United States, 256 A.2d 567, 6 CLB 52.

Ohio Defendant who publicly wore United States flag as cape did not thereby "cast contempt upon" flag within statutory prohibition. State v. Saionz, 261 N.E.2d 135 (Court of Appeals of Ohio), 6 CLB 604.

§80.42. Fornication

New Jersey Private nonviolent sexual intercourse between two consenting adults, a man and a woman, is as criminal an act today as it was when the law was enacted in 1796. State v. Barr, 265 A.2d 817, 6 CLB 463.

§80.55. Governmental interference

Illinois Where officers were unable to complete arrest, the defendant was found to have interfered with and obstructed officers in performance of their duties even though he did not physically interfere with or touch the officers. People v. Gibbs, 253 N.E.2d 117, 6 CLB 224.

§80.65. Kidnapping

Maryland Where the defendant forced the complainant into his car telling her the lie that he was an escaped criminal and she was his hostage, and then drove her to a wooded spot where he raped her, the evidence was sufficient to sustain the finding that the kidnapping was not an integral part of a preconceived plan to commit rape, and that a separate crime of kidnapping had been committed. It was therefore unnecessary to consider whether acts falling within technical statutory definition of kidnapping might be insufficient to support conviction of that crime if they were an "integral part" of another crime. Lester v. State, 266 A.2d 361, 6 CLB 520.

§80.75. Larceny

Court of Appeals, 3rd Cir. In the absence of a statute prohibiting joyriding, and in the absence of any proof of intent to deprive the owner of his property, juveniles who took horses for a ride were not guilty of larceny or any other crime. Government of the Virgin Islands v. Williams, 424 F.2d 526, 6 CLB 456.

New York Where defendant, after informing librarian of his intention, removed a magazine from public library because it contained what he regarded to be an obscene passage, defendant did not have requisite criminal intent to be found guilty of larceny. People v. Gorton, 304 N.Y.S. 2d 69, 6 CLB 54.

§81.10. Obscenity

District of Columbia Defendant, who was the manager of a theater and who was actually present, knew or had reasonable opportunity to know the character and content of performer's act, and had burden under obscenity statute, of ascertaining whether performance might have been obscene; and neglect to do so was not an adequate defense. Morris v. United States, 259 A.2d 333, 6 CLB 224.

Maryland Newspaper cartoon naming and depicting naked judge of circuit court masturbating was not without redeeming social value. Dillingham v. State, 267 A. 2d 777, 6 CLB 521.

New York Plaster replica of penis in state of erection which is hollowed out to contain batteries (to permit vibration) and which is equipped with a belt to be used in fastening the device about the body in pubic area was obscene. Although the court stated that the graphic representation of genitalia is not *per se* obscene, it will be deemed obscene when accompanied by some indication of sexual activity (i.e., sexual intercourse, masturbation or sodomy), without social justification or excuse. People v. Clark, 304 N.Y.S.2d 326, 6 CLB 102.

Virginia Where justice of peace's inquiry into question of whether motion picture was obscene before issuing search warrant was limited to mere questioning of police officer, whose affidavit alleged obscenity, as to whether the film was bad, sufficient basis for issuance of search warrant for defendant's premises had not been shown and product of search held pursuant to such warrant was inadmissible. Lee Art Theatre v. Commonwealth, 170 S.E.2d 769, 6 CLB 229.

§81.25. Possession and sale of drugs

Court of Appeals, 3rd Cir. Proof that defendant was present during sale of narcotics by another person to government agent is not sufficient to overcome presumption of innocence. Resultant conviction for aiding and abetting in sale is a deprivation of due process constituting guilt by association. United States v. Pratt, 429 F.2d 690 (3rd Cir.), 6 CLB 592.

Missouri Defendant who exchanged prohibited drugs for cigarettes and a television set was guilty of violating the statute declaring it unlawful to sell drugs, even though no money ever passed from the buyer to the defendant. State v. Davis, 450 S.W.2d 168, 6 CLB 368.

New York Where a defendant had permitted marijuana smoking on his premises on a recent past occasion, but at the time of the raid he was not present and had not been living at home for a week, and the apartment had been freely available to the comings and goings of others, some of whom were users, the evidence was insufficient to sustain a conviction of defendant for possession of a dangerous drug or for possession of narcotics implements (pipes), even though several items of contraband were found among his personal effects. The evidence was, however, sufficient to sustain a conviction for criminal nuisance. People v. Shriber, 310 N.Y.S.2d 551, 6 CLB 64.

§81.30. Prostitution

Oregon Defendant was properly convicted of receiving earnings of a prostitute, even though the prosecution neither alleged nor proved the existence of any agreement between accused and prostitute; *mens rea* or *scienter* is not an essential element of the crime. State v. Zusman, 460 P.2d 872, 6 CLB 165.

§81.32. Rape

Court of Appeals, D.C. Cir. Whether complainant in rape case "consented" to sexual relations with the defendant is properly an issue for the jury. Johnson v. United States, 426 F.2d 651, 6 CLB 514.

Illinois A conviction for attempted rape was sustained where the complaining witness' testimony showed that defendant twice said something like "at first I wanted your money, but now I want you" even though it was admitted that he never struck the complaining witness, never attempted to throw her to the ground, never attempted to kiss her, never touched any intimate part of her body, never attempted to lift her dress, never pressed his body against hers, and never exposed himself to her. People v. Otkins, 252 N.E.2d 906, 6 CLB 213.

§81.55. Traffic violations

New York Horse-drawn stagecoach is not a "motor-vehicle" within the state vehicle and traffic law proscribing the operation of a motor vehicle while intoxicated. People v. Smith, 311 N.Y.S.2d 125, 6 CLB 468.

§82.70. Statutory construction — importation

Court of Appeals, 5th Cir. Transportation of drugs from a Territory of the United States to a state is "importation" into United States within meaning of criminal statute. United States v. Matthews, 427 F.2d 992, 6 CLB 515.

§83.05. Alien registration — defenses

Court of Appeals, 9th Cir. Where a defendant charged with failing to register as an alien maintained that he had acquired derivative citizenship through the remarriage of his widowed mother to a naturalized citizen during defendant's childhood, the validity of the mother's marriage was an issue at his criminal trial and could be challenged as bigamous and therefor void under then prevailing state law. United States v. Sacco, 428 F.2d 264, 6 CLB 505.

§83.07. Federal jurisdiction — interstate commerce

Court of Appeals, 2nd Cir. 18 U.S.C. 891,894, designed to attack "loan sharking" by making it a federal crime to use extortionate means to collect extensions of credit is upheld as a valid exercise of Congressional power over interstate commerce even though no actual connection with interstate commerce need be proven as an element of the individual crime. United States v. Perez, 426 F.2d 1073, 6 CLB 510.

§83.30. Interstate transportation of "goods"

Court of Appeals, 5th Cir. A forged traveler's check is a "security" within the meaning of a statute (18 U.S.C.A. § 2314) prohibiting interstate transportation of forged or falsely made securities. United States v. Brown, 417 F.2d 1068, 6 CLB 213.

§83.45. Evidence — sufficiency

Court of Appeals, 6th Cir. Where a brothel owner made telephone calls to his prostitutes to tell them he loved them and to discuss personal matters, government assertion that he was keeping them happy in order to induce them to cooperate with him in his business was too tenuous to sustain his conviction for using the facilities of interstate commerce (the telephone) with intent to promote, manage, facilitate or carry on an unlawful activity (prostitution). United States v. Judkins, 428 F.2d 333, 6 CLB 510.

§83.80. Selective service violations

United States Supreme Court The draft boards are without power to declare a registrant with a II-S student deferment "delinquent," reclassify him I-A, and order him to report for induction simply because he surrendered his draft card in violation of the regulations. Guttnecht v. United States, 24 L Ed.2d 532, 6 CLB 400.

Court of Appeals, 2nd Cir. Although the Selective Service regulations provide that a "local board" may consider reopening a classification "upon written request of the registrant," an oral statement amounting to a request for conscientious objector status made at the induction center by a person unskilled in the law should be brought to the attention of the local board, and the registrant afforded an opportunity to reduce the oral statement to writing. United States v. Holmes, 426 F. 2d 914, 6 CLB 515.

§83.85. Threats

Court of Appeals, D.C. Cir. Neither idle talk nor mere jest is a threat within the meaning of the statute prohibiting threats against the life of a President of the United States. Alexander v. United States, 418 F.2d 1203, 6 CLB 287.

§85.00. Civil contempt — procedures

Pennsylvania The conditional nature of civil contempt, whereby the contemnor may purge himself by answering the questions put to him, justifies holding civil contempt proceedings absent the safeguards of indictment and jury, provided usual due process requirements are met. Petition of Spector, 268 A.2d 104, 6 CLB 518.

Pennsylvania The inherent power of courts to punish summarily by civil contempt was not excluded by a statute making refusal to testify after grant of immu-

nity punishable by criminal contempt. Petition of Spector, 268 A.2d 104, 6 CLB 518.

§85.10. Contempt — grounds

Court of Appeals, 5th Cir. Distribution of a publication called "Black Voices" to members of a grand jury investigating alleged sexual molestation of Negro women imprisoned in the city jail did not constitute a "veiled threat" to Negro members of the grand jury so as to justify a conviction of contempt. Thomas v. Crevasse, 415 F.2d 550, 6 CLB 87.

California Where the trial court failed to warn attorney that his tone of voice was antagonistic, insulting and disrespectful, attorney should not have been adjudged guilty of contempt. In re Hallinan, 459 P.2d 255, 6 CLB 50.

Idaho Defendant was properly found in contempt of court where he refused to obey court's order, even though that order was based on an erroneous interpretation of a statute. Barnett v. Reed, 460 P.2d 744, 6 CLB 158.

Maryland Citing the defendant for contempt when he refused to remove his headgear while being arraigned was error where the court refused to give the defendant, a member of a religious sect known as Ujamma, an opportunity to explain the nature of his religious beliefs and the requirements of his religion relating to the wearing of headgear. McMillan v. Maryland, 265 A.2d 453, 6 CLB 462.

Minnesota An attorney who urged and encouraged a justice of the peace to disregard an order of the highest court of the state was guilty of contempt. In re Daly, 171 N.W.2d 818, 6 CLB 157.

Oregon Defendant was properly convicted of contempt based on his failure to obey a subpoena to appear in M county, notwithstanding the fact that he had previously been subpoenaed to appear at the same time in B county. State v. O'Malley, 461 P.2d 832, 6 CLB 219.

§85.20. — Formal requirements

New York Defendants are not entitled to a hearing on the relevancy of questions asked them by the grand jury before they could be cited for contempt of court for refusing to answer questions. In the matter of Gold v. Menna, 307 N.Y.S.2d 33, 6 CLB 360.

Rhode Island A trial judge may not mete out summary judgment for criminal contempt where he himself has not directly observed the commission of the disruptive action, however grave. Due process requires that the defendant be accorded the opportunity to defend or explain and to present witnesses in his behalf. State v. Costantino, 266 A.2d 33, 6 CLB 463.

§86.30. Extradition — procedure

Delaware The refusal of judge in *habeas corpus* proceeding to consider contention of petitioner, who was being held under a Governor's warrant for extradition, that he was not in the demanding state on date of the alleged offense was reversible error, and petitioner was entitled to the opportunity of overcoming, by clear and convincing proof, the *prima facie* case presented in the warrant on the issue. Dickerson v. State, 267 A.2d 881, 6 CLB 519.

§88.00. Forfeiture proceedings — in general

D.C.N.Y. Owner of an automobile impounded and sold pursuant to Contraband Seizure Act [49 U.S.C. § 782] was deprived of her property without due process of law when the government, though it knew owner's name and address, gave notice of proceedings by publication and by informal oral notice. The forfeiture of the auto was voided and the government was ordered to pay owner the value of the car based upon its retail value at the time of the seizure. Jaekel v. United States, 304 F. Supp. 993, 6 CLB 150.

§89.12. — Burden of proof in juvenile proceeding

United States Supreme Court Due process requires proof beyond a reasonable doubt

standard in juvenile proceedings where underlying charge would be a crime if committed by an adult. Re Winship, 25 L Ed.2d 368, 6 CLB 396.

Texas A finding of delinquency in a juvenile proceeding need not be "beyond a reasonable doubt." State v. Santana, 444 S.W.2d 614, 6 CLB 54.

§89.25. — Right to due process

Court of Appeals, 7th Cir. A juvenile in juvenile court proceedings must be advised of charges against him; is entitled to be advised of his right to assigned counsel, if indigent; must be told of the privilege against self-incrimination; and must be told that any finding of delinquency which may lead to a deprivation of liberty cannot stand unless it is based on sworn testimony of his accusers, subject to full opportunity for cross-examination. Reed v. Duter, 416 F.2d 744, 6 CLB 91.

Illinois The denial of a jury trial in delinquency proceedings in juvenile court did not violate the constitutional guarantees of a jury trial. Trial by jury is not crucial to a system of juvenile justice. *In re* Fucini, 255 N.E.2d 380, 6 CLB 366.

§89.40. — Standards for determining admissibility of confession or admission

Oregon A confession given by a juvenile to a police officer was admissible against the juvenile in a criminal proceeding against him that had been remanded from juvenile court, where the juvenile was not advised before making the statement that his case might be remanded from juvenile court to criminal court, but where he knew that the officer who took his statement and who first advised him of his rights was a policeman and not a juvenile court counselor. State v. Lewis, 468 P.2d 899, 6 CLB 410.

§89.45. Right to appeal

Court of Appeals, 7th Cir. I. Juvenile committed under state law cannot be denied right to effective review of proceedings that led to commitment where direct appeal was lost because of failure of authorities to advise her of her right to appeal and right to have counsel appointed for that purpose.

II. Equal protection of laws requires that juvenile have equal opportunity with adults for first appellate review. Reed v. Duter, 416 F.2d 744, 6 CLB 91.

§89.70. Commitment proceedings — in general

Indiana The commitment of the defendant who was a 27 year old illiterate, mentally retarded deaf mute who could not understand the nature of the charges against him or assist in his defense to a mental institution was not deemed to be a life sentence and was therefore not violative of due process. Jackson v. State, 255 N.E.2d 515, 6 CLB 357.

§89.73. Evidentiary rules applicable at commitment hearing

Wisconsin Where the state desires to commit a defendant convicted of a sex crime, it must prove at a full evidentiary hearing that the defendant is a deviate in need of specialized treatment; but since the hearing is not a part of the guilt determining process, proof beyond a reasonable doubt is not necessary. The state's burden is to satisfy the court "to a reasonable certainty by the greater weight of the credible evidence." Goetch v. State, 172 N.W.2d 688, 6 CLB 213.

§89.74. Right to counsel

Pennsylvania Those charged with or convicted of crime are entitled to legal representation at sanity commission hearings. Commonwealth *ex rel.* McGurrin v. Shovlin, 257 A.2d 902, 6 CLB 104.

§90.67. Prisoner's rights

Court of Appeals, 4th Cir. Defendant inmate of a correctional institution sued to have a ban removed on his correspondence with *Playboy* magazine, its attorney, a psychiatrist and to remove restric-

tions on correspondence with his local attorney. Held, on motion to dismiss, that a good cause of action was stated if purpose of correspondence was to further psychiatric, financial and legal assistance for his defective delinquency hearing but not if for the purpose of providing a critique of the law and implementation at the institution. Defendant has the right to seek assistance and testimony. Prison officials have right to protect discipline and security of the prison. Unresolved issues of fact here are to be determined at trial. McDonough v. Director of Patuxent, 429 F.2d 1189 (4th Cir.), 6 CLB 595.

§90.70. — Access to courts

Court of Appeals, 5th Cir. Petition written on four and one-half feet of toilet paper to have prison officials enjoined from refusing to furnish inmates sufficient writing papers for writs and other legal documents was denied where prisoners were allowed up to ten sheets of white bond paper a day. Courts will not judicially interfere with internal operations of prisons – except where abuse of discretion in treatments of prisoners could be found, and no such abuse could be found in this case. Conklin v. Wainwright, 424 F.2d 516, 6 CLB 456.